# United States Court of Appeals for the Second Circuit



**APPENDIX** 

76-5007

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76 - 5007

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CAMELIA BUILDERS, INC., E.J. YELVERTON, JR. FARNALE, INC., R.L. GOODALE and JEFFREY H. HUBBARD,

Respondents-Appellants

versus

FIDELITY MORTGAGE INVESTORS, Debtor,

Applicant-Appelle

APR 2 1976

APR 2 1976

APR 2 1976

SECOND CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HONORABLE RICHARD OWEN, JUDGE PRESIDING

> Jeffrey H. Hubbard 2297 Two Shell Plaza Houston, Texas 77002 (713) 225-0837

ATTORNEY FOR APPELLANTS

PAGINATION AS IN ORIGINAL COPY

## APPENDIX

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FOR THE SECOND CIRCUIT

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CAMELIA BUILDERS, INC., E.J. YELVERTON, JR. FARNALE, INC., R.L. GOODALE and JEFFREY H. HUBBARD,

Respondents-Appeliants,

versus

FIDELITY MORTGAGE INVESTORS, Debtor,

Applicant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HONORABLE RICHARD OWEN, JUDGE PRESIDING

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ATTORNEY FOR APPELLANTS

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1/27/16

Filed NOTICE OF APPEAL, by Camelia Buiders, Inc., E.J. Yelverton, Jr., Farnale, Inc., R.L. Goodale and Jeffrey H. Hubbard to the USCA. M/N.

FORM BK 74-E.

DARKRUPTCY DOCKET CONTINUATION

United STATES DIS-

3/6

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

75MM.154

In re

FIDELITY MORTGAGE INVESTORS,

Debtor.

Tax I.D. No. 59-1261963

Bankruptcy No.

PETITION UNDER CHAPTER XI

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Fidelity Mortgage Investors, a real estate investment trust organized and existing under the laws of the Commonwealth of Massachusetts, respectfully represents:

- 1. Petitioner's post office address is 660 Madison Avenue, New York City, New York 10022.
- Petitioner has had its principal place of business and its principal assets within this district for the preceding 6 months.
- No other case under the Bankruptcy Act initiated on a petition by or against petitioner is now pending.
- 4. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XI of the Bank-ruptcy Act.
- 5. Petitioner is unable to pay its debts as they mature.
- 6. Petitioner intends to file a plan pursuant to Chapter XI of the Bankruptcy Act.

VA -

- 7. Exhibit "A", a summary of petitioner's assets and liabilities, is attached to and made a part of this petition.
- 8. Annexed hereto and marked Exhibit "B" is a list of the creditors of petitioner and their addresses.
- 9. The execution and filing of this petition have been duly authorized by resolution of the Trustees of petitioner, as shown by a certified copy of such resolution annexed hereto as Exhibit "C".
- 10. The affidavit required by Rule XI-2 of this court is annexed hereto as Exhibit "D".

WHEREFORE petitioner prays for relief in accordance with Chapter XI of the Bakruptcy Act.

FIDELITY MORTGAGE INVESTORS

President and Trustee

WEIL, GOTSHAL & MANGES and CHARLES SELIGSON Attorneys for Petitioner 767 Fifth Avenue New York, New York 10022 (212) 758-7800

A Member of the Firm

### VERIFICATION

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, C.R. Watson, Jr., President and Trustee of the real estate investment trust named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information and belief, and that the filing of this petition on behalf of the corporation has been authorized.

as Exhib'

C.R. Watson, Jr.

Subscribed and sworn to before me this A day of January, 1975.

Notary Public

Netry Commission to the Commis

NICHAEL L. COOK
Notary Publics 51-21-6 of New York
No. 31-74-5535 County
No. 31-74-75535 County
Qualified in New York
Commission Expires March 30, 1978

FOR COURT USE ONLY January Bunkruptcy Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN

DISTRICT OF NEW YORK

FIDELITY MORTGAGE INVESTORS,

EXHIBIT "A"

Include here all names used by debtor within last 6 years.

Debtos

- 1. Petitioner's employer's identification number is 59-1261963.
- 2. If any of petitioner's securities are registered under section 12 of the Securities and Exchange Act of 1934, SEC file number is 1-6498-2.
- 3. The following financial data is the latest available information and refers to petitioners condition on 19 75 .

January 24, 19 75.
a. Total assets: \$ 206,741,059.
b. Liabilities: 182,434,558.

١.	Liabilities: 182,434,538.		Number of Holders
	Secured debt, excluding that listed below	§1., 694, 769	2
	Debt securities held by more than 100 holders	\$2,703,000. \$NONE	683
	Unsecured		
	Other liabilities, excluding contingent or unliquidated claims	\$178,036,789	190
	beneficial interest*	3.045.559	10.951

Number of shares of communication

Comments, if any:

\*Petitioner is a Massachusetts business trust. There are 943 record holders of 87,329 warrants.

- 4. Brief description of petitioner's business: Petitioner is engaged in mortgage lending for construction and development of real estate, and in ownership and the attendant operations of ownership of real property.
- 5. The name of any person who directly or indirectly owns, controls, or holds, with power to vote, 25% or more of the voting securities of petitioner is NONE
- 6. The raises of all corporations 25% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by petitioner are

WAC, Inc.

Continental Country Club

Community, Inc.

Lifetime Communities, Inc.

Southeastern Investment Resources, Inc. Country Club Plaza of Jacksonville,

FMI Development Corporation

T 1055-Exhibit A : Chapter XI

4 0 1974 BY JULIUS BLUMBERG, INC., 80 EXCHANGE PL., N.Y. C. 10004

JUL 3 1 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In re

FIDELITY MORTGAGE INVESTORS,

Bankruptcy No.

Debtor, :

75 B 154

FIDELITY MORTGAGE INVESTORS,

Applicant,

-against-

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE, JEFFREY H. HUBBARD and THOMAS W. CROCKETT, JR.,

Respondents.

ORDER TO SHOW CAUSE WHY RESPONDENTS SHOULD NOT BE ADJUDGED GUILTY OF CIVIL CONTEMPT

Pidelity Mortgage Investors ("FMI"), debtor-inpossession, having applied on March 27, 1975, for a certificate
of facts and an order under Rule 920 of the Rules of Bankruptcy
Procedure, and a hearing having been held on the 10th and 11th
days of April, 1975, after due notice to Camelia Builders, Inc.
("Camelia"), E.J. Yelverton, Jr. ("Yelverton"), Farnale, Inc.
("Farnale"), R.L. Goodale ("Goodale"), Jeffrey H. Hubbard
("Hubbard") and Thomas W. Crockett, Jr. ("Crockett"), the abovenamed respondents, and after hearing Weil, Gotshal & Manges and
Charles Seligson, attorneys for FMI, by Richard P. Krasnow and

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Michael Z. Brownstein, of counsel, in support of the application, and Jeffrey H. Hubbard, pro se and as attorney for Camelia, Yelverton, Farnale and Goodale in opposition thereto, and FMI having withdrawn its application as against Crockett, and upon all of the evidence adduced at said hearing, and upon the decision of this court dated July 14, 1975 and the Bankruptcy Judge's certificate of facts under Rule 920 of the Rules of Bankruptcy Procedure, dated July 29, 1975, annexed hereto; it is

Hubbard, the above-named respondents be, and they hereby are, required to appear before a United States District Judge for the Southern District of New York, in Room 506, United States Courthouse, Foley Square, New York, New York on the 19th day of August, 1975 at 10° o'clock in the forenoon of that day, to show cause why they should not be adjudged in contempt by reason of the facts certified in the said certificate, and why they should not be taxed with all costs incurred or to be incurred by FMI in connection with the proceedings commenced in the respondents entitled Camelia Builders, et al. v. Fideliay

Mortgage Investors, presently pending before the United States
District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] and the proceedings herein, inclusive of reasonable counsel fees; and it is further

ORDERED that service of this order shall be deemed sufficient if a copy thereof and of the certificate dated

July 39, 1975, be served upon Jeffrey H. Hubbard, pro se and as attorney for Camelia, Yelverton, Farnale and Goodale, on or before the 30 day of Jay , 1975.

Dated: New York, New York July 29, 1975

S/ Asa S. Herzog Bankruptcy Pudge

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In re

FIDELITY MORTGAGE INVESTORS,

Bankruptcy No.

:

Debtor,

75 B 154

FIDELITY MORTGAGE INVESTORS,

· Applicant,

-against-

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE, JEFFREY H. HUBBARD and THOMAS W. CROCKETT, JR.,

Respondents.

CERTIFICATE OF FACTS SHOWING CONTEMPT

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

I, Asa S. Herzog, Bankruptcy Judge in the aboveentitled case, upon the application of Fidelity Mortgage

Investors ("FMI"), the above-named debtor, for a Bankruptcy

Judge's certificate under Rule 920 of the Rules of Bankruptcy

Procedure, after hearings having been held on the 10th and

11th days of April, 1975, after due notice to Camelia Builders,

Inc. ("Camelia"), E.J. Yelverton, Jr. ("Yelverton"), Farnale,

Inc. ("Farnale"), R.L. Goodale ("Goodale"), Jeffrey H. Hubbard

("Hubbard") and Thomas W. Crockett, Jr. ("Crockett"), the abovenamed respondents, and upon the opposition to said motion by

said respondents, and FMI having withdrawn its application in

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respect to Crockett, make the following findings of fact and hereby certify such facts:

- 1. Heretofore and on January 30, 1975, FMI filed with this court a petition for an arrangement under Chapter XI of the Bankruptcy Act, and on January 31, 1975, FMI was authorized to continue operating its business as debtor-in-possession.
- 2. FMI is a Massachusetts business trust and has qualified in the past as a real estate investment trust.

  Immediately prior to the commencement of the Chapter XI case herein, it was engaged in the business of making short-term construction and development loans, generally secured by first mortgages on the subject property, and owning and operating real estate.
- 3. Upon the filing by FMI of its Chapter XI petition, the automatic stay provision contained in Rule 11-44 of the Rules of Bankruptcy Procedure became applicable and stayed, inter alia, the commencement or the continuation of any court or other proceeding against the debtor. Rule 11-44 provides, in part, as follows:
  - (a) Stay of Actions and Lien Enforcement.

    A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except

a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

- 4. On or about March 29, 1972, FMI had entered into a construction loan agreement with Camelia Bay Corporation (the "Borrower") for the purpose of loaning monies to the Borrower so as to enable it to construct an 80-unit condominium project in Jackson Mississippi. As security for the loan, FMI received a first deed of trust on the property in Mississippi and the 80-unit condominium to be constructed thereon. Plaintiff's Exhibit 2 (Exhibit B annexed thereto).
- 5. In January, 1975, prior to the commencement of the Chapter XI case herein, as a result of Borrower's default on its loan agreement, FMI sought to preserve and protect its investment by commencing a non-judicial foreclosure on its first deed of trust on the subject property. Tr. at 7\*.
- 6. In January, 1975, prior to the commencement of the Chapter XI case herein, Camelia and Farnale, as a joint venture, commenced an action against the debtor in the Circuit Court of Rankin County, Mississippi (the "State Court Action"). In the State Court Action, Camelia and Farnale sought (1) an order enforcing their purported mechanic's and materialmen's lien against the subject property; and (2) a monetary judgment against the debtor. Plaintiff's Exhibit 2 (Exhibit F annexed thereto); Defendant's Exhibit B, Tr. at 8.

<sup>\*</sup> Numbers preceded by the prefix "Tr," shall refer to the pages of the Transcript of the Hearing held on April 10 and 11, 1975.

- 7. On or about March 24, 1975, Camelia and Farnale, as a joint venture, commenced an action against FMI in the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] (the "Mississippi Action"). Blaintiff's Exhibit 2; Tr. at 10, 112. Respondents Hubbard and Crockett are counsel for Camelia and Farnale and instituted the Mississippi Action on their behalf. Respondents Yelverton and Goodale are officers of Camelia and Farnale, respectively.
- 8. In the Mississippi Action, Camelia and Farnale sought relief strikingly similar to that sought in the State Court Action, requesting an order (1) enjoining FMI from proceeding with the non-judicial foreclosure sale of the subject property; (2) declaring an alleged mechanic's and materialmen's lien held by Camelia and Farnale, for services purportedly rendered prior to the institution of the Chapter XI case herein in the amount of \$75,964.33 to be superior to the lien of FMI; and if the foreclosure were not enjoined (3) requiring FMI to turn over to Camelia and Farnale the proceeds of the sale to the extent of \$75,964.33. Plaintiff's Exhibit 2; Tr. at 63.
- 9. In the Mississippi Action, the Honorable Walter M. Nixon, U.S. District Judge, denied Camelia's and Farnale's request for an order enjoining the foreclosure sale, but directed FMI to deposit \$75,964.23 with the court pending a determination of the effect of the FMI Chapter XI case upon that court's jurisdiction, which monles were deposited by FMI. Plaintiff's Exhibit 3 (pp. 36 et seq.); Tr. at 12-17.

- Action, the respondents were fully aware of the pendency of the Chapter XI case herein. On January 31, 1975, the day after FMI filed its Chapter XI petition and approximately two months prior to the commencement of the Mississippi Action, Goodale read in the Wall Street Journal a new item reflecting that FMI had filed a Chapter XI petition and had so advised respondent Hubbard.

  Tr. at 82-85, 105-107; Court's Exhibit.
- aware of FMI's filing of its Chapter XI petition when they received a copy of a pleading which had been filed by FMI in the State Court Action wherein FMI stated that it had filed a Chapter XI petition in this court, and that under Rule 11-44 the commencement of all suits against the debtor was stayed. Tr. at 86-88, 110-11, 118; Plaintiff's Exhibit 2 (Exhibit G annexed thereto).
- Action, Hubbard, although making no effort to contact with or inquire of FMI, did contact the clerk of the United States District Court for the Southern District of New York and confirmed that FMI had filed a Chapter XI petition. Tr. at 111-12, 115-15, 118-21. Notwithstanding such knowledge and being fully cognizant of the stay provisions contained in Rule 11-44, Hubbard wilfully and deliberately disregarded such stay and commenced the Mississippi Action on behalf of Camelia and Farnale. Tr. at 113.

contemptuous conduct on the part of respondents Camelia, Farnale, Goodale, Yelberton and Hubbard warrant the imposition of an appropriate punishment under Rule 920 of the Rules of Bankruptcy Procedure. I recommend, therefore, that, pursuant to Rule 914 and 754(b) of the Rules of Bankruptcy Procedure, such punishment should include a taxation of all costs, inclusive of reasonable attorneys' fees, incurred or to be incurred by FMI in connection with the Mississippi Action and the proceedings herein. Furthermore, I recommend that the respondents be directed to take any and all action necessary and proper to withdraw the Mississippi action and cause the \$75,964.33 deposited with the clerk of the United States District Court for the Southern District of Mississippi, Jackson Division, to be returned to FMI, if not already done.

Dated: New York, New York July 29, 1975

s/ Asa S Herzog

Bankruptan Judge

LIS PENDENS NOTICE

OWNER: Camellia Bay Corporation P. O. Box 12275 Jackson, Mississippi

CONTRACTORS: Camellia Builders, Inc., and Farnale, Inc. CLAIMANT: Brent's Nurseries

RE: Portions of the NE 1/4, SW 1/4, SE 1/4 of the NW 1/4, NW 1/4 of the SW 1/4, and SW 1/4 of the NW 1/4, Section 5, T6M R3E, Rankin County, Mississippi, containing 10.51

Brent's Nurseries hereby gives notice that the above named contractors have not paid it for materials and labor furnished and used in the construction of improvements on your condominium project described above in Camellia Bay on the Ross Barnett Rederroir in Rankin County, Mississippi, of which Camellia Bay Corporation is the owner. The amount - presently due Brent's Nurseries, for such materials and - labor is \$2,837.36, plus interest at ten percent (100) per 

Brent's Nurseries hereby gives notice that it are sented at Torclaims the benefits of Section 85-7-181, Mississippi Code of 1972, and that the amount due the above named contractors by the owner shall be bound in your hand for the full payment of the obligation due Brent's Nurseries.

Fenance - 1974- -

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STATE OF MISSISSIPPI COUNTY OF HINDS

authority in and for the above county and state, Pat H.
Scanlon, attorney for Brent's Nurseries, who being first
duly sworn by me, stated on oath that he signed and delivered the above and foregoing Lis Pendens Notice on behalf
of the corporation, he being first duly authorized so to do;
that a copy of said notice has been delivered to the above
named Owner by certified mail, return receipt requested, on
the above mentioned date and that he is authorized by Sent Sent's Nurseries to execute this affidavit. \_\_\_\_\_ :: Brent's Nurseries to execute this affidavit.
Witness my hand and soal of office, this And day

of October, 1974.

Stely of Hriff

RANKIN COUNTY, MISS. THIS INSTRUMENT WAS FILED FOR RECORD

.4. er.T.

C. E.

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#### LIS PENDENS NOTICE

Camellia Bay Corporation P. O. Box 12275 OWNER: Jackson, Mississippi

CONTRACTORS: Camellia Builders, Inc., and Farnale, Inc. CLAIMANT: Gulf States, Inc.

RE: Portions of the NE 1/4, SW 1/4, SE 1/4 of the NW 1/4, NW 1/4 of the SW 1/4, and SW 1/4 of the NW 1/4, Section 6, TSN, RRE, Rankin County, Mississippi, containing 10.51 acres, more or less.

Gulf States, Inc., hereby gives notice that the above named contractors have not paid it for materials and labor furnished and used in the construction of improvements on your condominium project described above in Camellia Bay on the Ross Barnett Reservoir in Rankia County, Mississippi, of which Camellia Bay Corporation is the owner. The amount presently due Gulf States, Inc., for such materials and labor is \$22,165.00, plus interest at the legal rate.

Culf States, Inc., hereby gives notice that it claims the benefits of Section 85-7-181, Mississippi Code of 1972, and that the amount due the above named contractors by the owner shall be bound in your hand for the full payment of the obligation due Gulf States, Inc.

WITHESS OUR SIGNATURES, this The day of October.

1974.

STATE OF MISSISSIPPI COUNTY OF HINDS

Personally appeared before me, the underwigned authority in and for the above county and state, Pat M. Scanlon, attorney for Gulf States, Inc., who being first duly meers by me, stated on oath that he signed and delivered to the above and foregoing Liz Pendens Notice on behalf of the corporation, he being first duly authorized to to do; that a copy of said notice has been delivered to the above named Owner by certified mail, return receipt requested, on the 1 over mentioned date; and that he is authorized by Gulf States, Inc., to execute this effidavit.

Withese my hand and seal of effice, this fits day of Octobes, 1974.

of tetober, 1974.

My Commissator Employer: 9/19/19

STATE OF MISSISSIPPI) COUNTY OF RANKIN )

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authority undersigned the ME. BEFORE Thurse Blanche, deputy to Irl Dean Rhodes, Chancery Clerk of Rankin County, Mississippi and on oath deposed and stated the following:

(I) The Office of the Chancery Clerk of Rankin County, Mississippi is the office where transfers of real estate are recorded in said county.

- (2) I have made a diligent search of all relevant records in said county.
- (3) I hereby certify that I have failed to find filed herein a certified copy of a Petition under Chapter XI filed in the United States District Court for the Southern District of New York of Fidelity Mortgage Investors, in cause number 75 B 154 as a result of such search.

Thomas Branchi

Notary Public in and for Rankin County, Mississippi By: Fance Luy, F. C.

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STATE OF MISSISSIPPI )

COUNTY OF HINDS

Before Me, the undersigned authority appeared Doggan, Clerk of the Bankruptcy Court, Southern District of Mississippi, Jackson Division, and deposed and stated the following:

- (1) The Office of the Clerk of the Bankruptcy Court is the office where Bankruptcy petitions are filed for said District.
- (2) I have made a diligent search of all relevant records and have failed to find a copy of a Petition under Chapter XI filed in the United States District Court for the Southern District of New York of Fidelity Mortgage Investors, in cause number 75 B 154 as a result of such search filed among the records of this Court.

marile Frage SWORN AND SUBSCRIBED BEFORE ME, the undersigned

authority on this 14th day of August, 1975.

My Commission Caption Supt. 19, 1876

Houston, Texas time, I was advised that if I called back on Monday, March 24, 1975 in the afternoon there would be someone available to search the bankruptcy records by

On March 23, 1975 I prepared and sent by messenger service to counsel in Mississippi the Complaint to be filed in the United States District Court of Mississippi. In midmorning of March 24, 1975 I received a phone call from counsel in Mississippi who advised he had received the Complaint, caused same to be filed with the Clerk of the United States District Court of Southern District of Mississippi and had obtained a hearing in connection therewith to be held on March 26, 1975 at 1:00 P.M. in Meridian, Mississippi.

On the afternoon of March 24, 1975 at about 2:00 P.M. Houston time, I again called the Clerk of the Bankruptcy Court for the Southern District of New York and was told to call back in about one hour. Sometime after 3:00 P.M. Houston time on March 24, 1975 I again called the Clerk of the Bankruptcy Court for the Southern District of New York and W. hen advised that: Fidelity Mortgage Investors had filed a Chapter XI proceeding on January 30, 1975; the cause number was 75 B 154; no order of any nature including enter authorizing debtor in possession or setting first meeting of creditors had been entered; the only matter on file or reflected on the docket sheet was the Petition of yell for Chapter XI proceeding and list of its creditors."

# JEFFREY W. WISHARD

shows to AND SUBSCRIBED REPORT ME, the understand activority on this day of October, 1975 to certify which vitness my hand and soul of office.

AND THE TOTAL PRESENT AND THE

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In re

FIDELITY MORTGAGE INVESTORS,

Bankruptcy No. 75B 154

Debtor, :

FIDELITY MORTGAGE INVESTORS, :

MEMORANDUM AND ORDER

Applicant,

-against-

CAMELIA BUILDERS, INC., E.J. YELBERTON, JR., FARNALE, INC., R.L. GOODALE, JEFFREY H. HUBBARD and THOMAS W. CORCKETT, JR.,

Respondents.

OWEN, District Judge

This contempt proceeding is before me on certification

from the referee pursuant to Rule 920(a)(4) of the Bankruptcy

Rules of Procedure. Bankruptcy Judge Herzog, in his certification

Rule 920(a)(b) reads as follows:

Cortification to District Judge. If it appears to a referre that conduct prohibited by 5 41a of the Act may warrant punishment by imprisonment or by a fine of more than \$250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

decision of July 14, 1975, found as follows: respondents, after having actual notice of Fidelity Mutual Investor's [hereinafter FMI] Chapter XI filing, brought suit against FMI in Federal District Court for the Southern District of Mississippi in violation of the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure. 3

After oral argument on August 19, 1975 and a complete examination of the record, I find that respondents are in civil contempt.

Under Eankruptcy Rule 810, I am obliged to "accept the

This action [hereinafter the Mississippi action] sought an order: 1) enjoining FMI from proceeding with the non-judicial sale; 2) declaring the contractors' alleged mechanic's and materialmen's lien for services purportedly rendered prior to institution of this Chapter XI case in the amount of \$75,964.33 to be superior to the lien of FMI, and, if the foreclosure sale were not enjoined, 3) requiring FMI to turn over to the contractors the proceeds of the sale to the extent of \$75,964.33. The Mississippi district court allowed the sale to proceed, but required FMI to put the \$75,964.33 in escrow until resolution of the action.

Rule 11-kk - Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement reads, in pertinent part, as follows:

A petition filed under Bule 31-6 or 11-7 shall operate as a stay of the commoncement or the continuation of any court or other proceeding against the debtor . . . .

referee's findings of fact unless they are clearly erroneous, and . . . give due regard to the opportunity of the referee to judge of the credibility of the witnesses." Respondents claim that under O'Hagan v. Blythe, 354 F2d 83 (2d Cir. 1965), the clearly erronous standard does not apply to a contempt certification. However, the reasoning in O'Hagan is based on the referee's inability to cite for contempt prior to 1973. However, under the new Bankruptcy Rules, a referee has the power to summarily punish for contempt (R.920), and the District Court reviews his certification of facts as an appellate court.

R. 810 being applicable, I hold that the referee's findings of fact are not clearly erroneous. While the record is not unequivocal that respondent Hubbard knew with certainty that FMI was in bankruptcy the day before he had the Mississippi action filed, by his own testimony at the hearing before Bankruptcy Judge Herzog, he knew on Earch 24, 1975, the day the suit was filed. If the suit had been filed before Mr. Hubbard had received final confirmation from the Southern District of New York Clerk, he should have ordered the suit discontinued. Respondents were well aware of the automatic stay provision of R. 11-44. If the Mississippi action was as essential to the preservation of their rights as they claim, relief was available under R. 11-24(e), which provides for ex parts relief from the automatic stay.

) ~ (?)

Instead, respondents chose to rely on 28 U.S.C. §959(a) as an exception to R.11-44. Their reliance is misplaced.

As Judge Herzog reasoned in his certification decision, the non-judicial foreclosure sale by FMI of property in which both FMI and Respondents Camelia Builders, Inc. and Farnale, Inc., a joint-venture, claimed liens, did not constitute a "carrying on of business" as required by 28 U.S.C. § 959(a). Respondents' alleged good faith reliance on § 959 will not prevent them from being found in contempt.

It is equally apparent that the deliberate disobedience by respondents . . . is not mitigated by their subjective legal conclusions. Unlike its criminal counterpart, civil contempt is "'wholly remedial,' serves only the purpose of a party litigant and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by non-compliance." [citations omitted]. [T]he good faith underlying the respondents' determination to sue in the [State] court does not diminish their culpability.

In re American Associated Systems, Inc., 373 F. Supp. 977, 979 (E.D. Ky. 1974).

Respondent Hubbard, as attorney for himself and the other

25 U.S.C. § 959(a) reads as follows:

Trustees, receivers, or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of instice, but this shall not deprive a litigant of his right to trial by jury.

respondents, is equally in contempt with the clients he counseled. Mr. Hubbard was aware of the automatic stay provision of Rule 11-44 and yet he chose to proceed, hoping that 28 U.S.C. § 969 would apply. Bankruptcy Judge

Herzog found as follows:

I think he played fast and loose with the Rules by, in his own language, 'hedging his bet.' It only indicates to me a contemptuous attitude to Rules which have the sanction of the Supreme Court and of the Congress of the United States. I don't think there is room for hedging.

\* \* \* \*

This court is loathe to certify an attorney for contempt but if an attorney will not recognize and honor the obligation to obey the automatic stay provisions of the Rules, how could a layman be expected to do so.

I therefore conclude that respondents are guilty of contempt of court and grant applicant FMI's request for costs, including attorneys' fees incurred by FMI in connection with the Mississippi action and prosecuting this contempt proceeding. Respondents are also required to cause the mories which were deposited by the debtor-in-possession in the Mississippi action to be returned to FMI.

Submit order on notice.

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United States District Judge

December /6 . 1975.

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK (In Bankruptcy)

In the Matter

of

FIDELITY MORTGAGE INVESTORS.

No. 75-B-154

Debtor

United States Court House Foley Square, New York, N.Y.

April 10, 1975 - 4:00 P.M.

Before:

HON. ASA S. HERZOG

Bankruptcy Judge

ORDER TO SHOW CAUSE V. CAMELIA BUILDERS, INC., et al.

Appearances:

CHARLES SELIGSON, Esq., and WEIL, COTSHAL & MANGES, Esqs.

Accorneys for Debtor 767 Fifth Avenue

New York, New York 10022

By: RIGHARD P. KRASHOW, Esq., and

MICKAEL Z. SHOWNSTEIN, Esq., of Counsel

DEATRICE R. GETTLIED
Official Court Reporter
Reseas 2.15. United States Courthouse
Foley Square, New York, N. Y. 10007
REseas 2.3932

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# APPEARANCES (Continued);

JEFFREY H. HUBBARD, Esq. 2297 Two Shell Plaza , with Houston, Texas . .

Hew York, New York 10017 Co-counsel for Respondents

ERFELD: Your Hener, may I make a I just heard about this case this afternoon, and with the consent of counsel I request permission to have the case presented for the respondents by Mr. Jeffrey Hubbard. I think you have met him. He is a member of the Bar of Texas.

THE COURT: Yes, I already indicated to him that he could do so.

MR. SILBERFELD: Thank you very much, sir.

MR. KRASHOWN Your Hener, I would like to present to your Honor the affidevits of service at this time (handing same to the Court).

If your Honor pleases, this is a contempt proceeding brought on pursuent to an order to show cause signed by your Konor, on Hereb 28, 1975, by the application of THE against Camelia

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the Camelia Bay Condominium project which is near Jackson, Miss.

Q Will you please explain to the Court what you did in connection with that retention?

A I was employed by FMI back before the Chapter XI proceedings were commenced to handle the foreclosure of the Camelia Bay project on which FMI was holding a first Deed of Trust.

Q And what action did you take with respect to that foreclosure?

A We commenced -- first we prepared and had executed and placed of record a substitution of trustee, substituting myself as the substituted trustee in the place instead of the original trustee in the Deed of Trust, and then as substituted trustee we commenced a foreclosure which sale would have been held in February.

In the interim the Chapter XI proceeding was commenced and we were requested by PMI to hold up on that
foreclosure, and as a result of some negotiations beand
tween FMI, the owner of the project, the Camelia Lay
Corporation. We did so and there was some payment made
or something. I was not privy to those negotiations.

Q Would you say this was a non-judicial sale?

A non-judicial sale.

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Q Pursuant to --

A Pursuant to the Dead of Trust and the statutes of the State of Mississippi.

We were then requested to commence the foreclosure again and we gave the proper notices and commenced the publication for sale to be held on the 28th of March, 1975, again, a non-judicial sale.

Q Prior to the sale of the property, the trustee's sale, did the respondents herein commence any action in the State Court relating to the property upon which FMI had its Deed of Trust?

A suit was filed in the Circuit Court of Rankin

County, Miss., one of our State Trial Courts, in January

of 1975. The declaration or petition of that suit is

Exhibit L to the complaint filed in the United States

District Court which you already have introduced as an

exhibit this afternoon, the large loan exhibit, your

Honor. It has a number of exhibits to it. Exhibit F

which is near the back is a copy of the petition that

was filed in the Circuit Court of Rankin County and that

was a suit --

THE COURT: That is criled the petition to enforce lien for monetary judgment?

THE WITHESS: Yes, sir. That was a suit that

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and sought to have it adjudicated that the contractor, Camelia Builders and Farnale, Inc., the joint venture, had a lien against the property that was subject to the Deed of Trust in question, and they sought to have it adjudicated that that lien was prior to the lien of the Deed of Trust.

- Q Approximately when was that State Court action commenced?
- A January 17th, I believe, is the date of that action.
- Subject to the filing by FMT of the Chapter XI petition, did you file any papers in that State Court action reflecting that?
- A Yes sir, on March 17th we filed and served on counsel of regord in that case, Mr. Crockett, a Plea and Abatement, which is Exhibit G to the United States District Court complaint based upon the Chapter XI proceedings having intervened and based upon Rule 11-44 of the new Bankruptcy Rules.
- Q What is the present status of that State Court proceeding?
- A There has been no action in that proceeding since the filing of the Plea and Abetement.
  - Q Subsequent to the filing of the Plea and

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Abatement was another action commenced by the respondents here in any other court?

and Bannala in Dankin County

A Yes, sir. On March 25, 1975 on a Tuesday shortly before noon I was served with a copy of the complaint which had been filed in the United States District Court for the Southern District of Mississippi, together with a notice of hearing, and that complaint and notice you also introduced as exhibits here this afternoon.

THE COURT: Exhibits 1 and 2.

MR. KRASNOW: Yes.

A (Continuing) And I was served with those, and the notice was to appear before Judge Nixon the following day, Wednesday the 26th, where he would then be in Meridian, Miss., some 100 miles from Jackson in connection with their application for immediate relief under the petition or complaint.

Q Where in that complaint is the request for relief?

A It is in the WHEREFOR clause on the 4th and 5th page thereof.

MR. KRASNOW: If your Honor please, I refer the Court to that WHEREFUR clause and I believe it speaks for itself, your Honor, but if you will note I believe they are asking for a little more

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\$75,000 plus with the Clerk of the Court?

THE WITNESS: Yes.

MR. KRASNOW: Your Honor, if I may just point out, I believe it indicates that they would have to post moneys in the event that the respondents posted the bond.

THE COURT: He made the condition and they said they would file the bond. They said there would be no problem about that.

THE WITNESS: Your Honor, you asked me a question and I did not get to finish. You asked me what had been done following the hearing in the proceeding. The filing of the bond was one thing. The other thing was in the order the Judge gave each party ten days to file a brief, and following that order you had certain proceedings up here, and because of the pendency of these proceedings I wrote the Judge and asked him for an extension of the time to file a brief, which he gave me. Mr. Hubbard has filed a brief, which he was kind enough to send me a copy, which I received yesterday.

THE COURT: Which I gave him permission to do. THE WITNESS: Yes, I understand it, and he so advised Judge Nixon.

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The other thing is that the money has been paid to the Court and I did that as soon as I was satisfied that the checks to me as trustee had cleared the bank, and I made that payment the day before yesterday.

MR. HUBBARD: I want to object to this, your Honor. The best evidence will be the receipt or the check, the cancelled check, or however, which will show the transfer of the moneys.

THE COURT: I will permit him to say he de-

MR. HUBBARD: Thank you.

#### DIRECT EXAMINATION

### CONTINUED BY MR. KRASNOW:

Q As of this date, Mr. Young, does FMI have title to the said property?

A Yes sir, FMI was the successful bidder at the foreclosure sale, and a trustee's deed was executed to FMI to the property.

Q Mr. Young, have you kept time records with respect to all actions taken by you or other members or associates of your firm, in connection with the Mississippi action and these contempt proceedings?

A Yes sir, I have.

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my office --

MR. KRASNOW: Your Honor, I am not sure this is relevant to the issue of whether or not respondents were in contempt of the order of this Court.

THE COURT: What was the question that was asked?

MR. KRASNOW: The question that was asked was with respect to the posting of the foreclosure sale.

THE COURT: Let's see the direction he is going in.

A On March 4, 1975 Mr. John Howard Shows, an associate in my office, delivered the foreclosure notice to the newspaper in Brandon, Miss. and at the same time posted the notice on the bulletin board inside the door of the Rankin County courthouse at Brandon, Miss.

Mr. Shows made an affidavit to that effect with which you are familiar and it was introduced into evidence at the hearing in Meridian.

Q I believe you testified a moment ago that you had originally prepared foreclosure and then stopped work on that foreclosure after the filing of the Chapter XI by FMI; is that correct?

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A We did not stop it after the filing of the Chapter XI insorar as in relation to the filing of the Chapter XI; it was subsequent to the filing of the Chapter XI as I recall, but it was unrelated to that.

Q And after additional negotiations between Camelia Bay Corporation, the record title holder of the property and FMI, then you went forward with the foreclosure?

A After negotiations we stopped the first foreclosure, didn't go through with it and did not hold the sale.

Then as requested by the holder, FMI, we re-noticed the foreclosure.

THE COURT: After the negotiations failed, is that it? They were not fruitful?

THE WITNESS: No, sir. I think they were partially fruitful. My understanding of it is that Camelia Bay Corporation paid some money to FMI on the indebtedness in order to get the sale stopped knowing that it was to be immediately started again, but to give them an additional month within which to try to do something. That is what I was advised had happened.

Q And that month would have been the month of February 1975, is that right, Mr. Young, that I have the

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lawsuit by Camelia Builders and Farnale, joint venture, against Camelia Bay Corp., The First General Resources Corp. and Fidelity Mortgage Investors, Cause No. 8343 then pending in the Circuit Court, Rankin County, Miss.?

A I was aware of that, and I was also aware of the fact that under the statutes made by the State of Mississippi, the complainants in that case have a right to seek to enjoin the foreclosure sale under Mississippi Law by posting the proper bond and making the proper showing had they chosen so to do, and they had not chosen so to do, and we were not therefore under restriction, and I commenced the foreclosure sale.

Q I understand that. But, you were aware of that lawsuit?

A I said yes sir.

Q And you were aware that that lawsuit was filed January 17, 1975?

A I do not think I was aware at that time of the exact date it was filed. I know now that was the date it was filed.

Q Did FMI at the date they asked you to conduct this foreclosure, from March 4, 1975 to March 28th, advise you that they had been served in the Rankin

A In a broad sense of the use of the word foreclosure, yes sir.

Q Did you receive any kind of title report at all in connection with this property prior to the time you sought foreclosure on March 4, 1975?

A At some point in time after we originally were employed and before March 28th, Mr. Shows examined the record relating to this property and ascertained what lien notices had been filed and what stop notices had been filed.

Q A construction lien notice had been filed by Camelia Builders, Inc. and Farnale against Camelia Bay Corp. on October 28, 1974, had it not, Mr. Young?

A Yes, sir, for \$100,784.68, and it was refiled on November 5, 1974, I know not why.

MR. KRASNOW: Excuse me, your Honor, just so that it is clarified in my own mind: in terms of Mr. Hubbard's question as to the respondents' purported lien against the property, it is not clear in my mind what relevancy that has to the issue before you.

THE COURT: I don't either, but I am allowing him to put it in and we will see what he is driving at. I will give him leeway to see what he is

driving at.

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You have brought a serious charge of contempt, and you are asking me not only to find him in contempt but to punish him to whatever extent I am permitted to and also to impose costs on him as a result of the alleged contempt. Now, I am not going to be very strict in my ruling here so as to foreclose him. I want to give him every leeway to explain what happened here so when I do make a ruling I will have all the facts before me.

The charge you make is a very serious one.

I do not take it lightly and I will not exclude things so I rule it on a simple technicality.

MR. HUBBARD: Thank you, your Honor.

#### CROSS EXAMINATION

#### CONTINUED BY MR. HUBBARD:

O That same affidavit that you have just mentioned, Mr. Young, which was obtained by your associate also shows --

MR. KRASNOW: Excuse me, your Honor, I have not seen a copy of this affidavit.

MR. HUBBARD: It was offered into evidence at the start of the proceedings, your Honor. It is an exhibit in the Mississippi lawsuit.

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# CROSS EXAMINATION

# CONTINUED BY MR. HUBBARD:

Q Mr. Young, on the hearing of March 26th in the Southern District of Mississippi did you offer into evidence two affidavits signed by John Howard Shows?

A Yes, sir.

Q And you have just now handed me two carbon copies of affidavits which have been executed and they have been previously marked D-2 and D-3; are those copies of the affidavits that you offered at that hearing?

A Yes sir, and those are identical.

MR. HUBBARD: Now I show them to counsel.

MR. KRASNOW: No objection, your Honor, subject to our standing objection to the whole thing.

THE COURT: Mark them.

(Two affidavits referred to marked in evidence as Defendant's Exhibits A-1 and A-2.)

Q Mr. Young, referring to the affidavit of Mr. Shows marked Exhibit A-2, the item C shows a stop notice filed, lis pendens, by Brent's Nursery, does it not?

A Yes, sir.

Q And there is another similar notice on behalf of Gulf States Inc. in the amount of \$22,165, is there not, sir?

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A Yes.

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Do you know who filed those notices, Mr. Young?

A Yes, sir.

O Who was that?

A Mr. Scanlon, my partner.

Q Subsequently, on or about March 18, 1975, did you have occasion to file in the Rankin County lawsuit No. 8343 a Plea and Abatement?

A Yes sir, I believe it was forwarded on the 17th and served upon Mr. Crockett on the 17th -- I don't know what date it was actually docketed by the clerk.

MR. KRASNOW: Excuse me, your Honor. Was that March 17th in the Circuit Court?

THE WITNESS: That's right. He said March 18th.
That is probably the date it was filed by the clerk.

MR. HUBBARD: I would like to offer into evidence the entire transcript of the Rankin County lawsuit, your Honor, and I show it to counsel.

THE COURT: Which lawsuit would this be?

MR. HUBBARD: This is the suit to foreclose the mechanic's and materialmen's lien filed in the State Court on January 17th.

MR. KRASNOW: Your Honor, may we go off the record?

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would refer you to page 4 of the complaint.

THE COURT: That is what I think is the gist of the contempt action, the contempt by action brought for this particular relief, 1, 2, 3 and 4.

MR. KRASNOW: Yes, your Honor, plus the action taken in connection with the suit by the respondents,

THE COURT: What they did followed in connection with it, but actually the commencement of
an action that is stayed by Rule 11-44. Actually
the point of the commission of the offense is the
institution of an action.

MR. KRASNOW: Yes, your Honor.

THE COURT: I note this, one of the things that they are seeking in their action is to vacate an order of this court.

MR. KRASNOW: Yes, your Honor.

THE COURT: It is an interesting point to raise especially by people who say that they did not know of an action instituted here in New York under the Bankruptcy Act.

MR. KRASNOW: And that they did not know there was a stay order.

THE COURT: All right, let's go ahead.

MR. HUBBARD: These lawsuits being offered,

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Show title to this real estate is in Camelia Bay
Corp. and not FMI and, in fact, the only interest
Camelia Bay Corp. has is a leasehold estate, and
it is on the leasehold that FMI held a Deed of
Trust lien or mortgage, and it is on that Deed of
Trust lien or mortgage that they foreclosed after
the institution of the lawsuit.

MR. KRASNOW: Your Honor, I still do not quite see the relevancy of that. They commenced the lawsuit against FMI. As of this stage FMI had title to the property and we would certainly concede that prior to the foreclosure sale we did not have title to the property, that we had a First Deed of Trust, rather, a lien by Deed of Trust against the property.

THE WITNESS: On the leasehold.

MR. KRASNOW: On the leasehold, your Honor.

MR. HUBBARD: Well, they may concede they had a First Deed of Trust, your Honor. I concede their Deed of Trust is subordinate to the mechanic's and materialmen's lien of my clients.

MR. KRASNOW: Your Honor, that, again, is an issue that I do not think is before the Court.

THE COURT: I will sustain the objection.

MR. HUBBARD: Thank you.

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At this time, your Honor, I would re-offer the lease so that the Deed of Trust may be more meaningful with the lease.

THE COURT: I do not see the materiality but we will allow it in. I am giving you all the leeway you want.

(Lease referred to marked in evidence as Defendant's Exhibit D.)

THE COURT: I do not think I am called upon to decide whether their foreclosure is defective, whether they complied with Mississippi law in foreclosing the property.

I am called upon to decide whether somebody
had a right to start an action against them in
Mississippi in spite of the Chapter XI pending here
with an automatic stay.

All the rest is immaterial or irrelevant and

I am receiving it so when you brief me on it if I

decide it is relevant I will have it before me.

At least if I am appealed then the Court above won't

have to remand it if they have the papers before

them.

MR. HUBBARD: I appreciate it.

AKD: 1002 1.

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on the perimeter of the lake and all the property is leased -- all the developments, residential or otherwise is leased and this is a lease from the Pearl River Valley Water Supply District to the Camelia Bay Corp. for the project, and this is the leasehold on which FMI held the First Deed of Trust that he introduced.

Q Mr. Young, did you file any pleading of any kind in the Mississippi lawsuit in the Federal court?

A No sir, didn't have time to before the hearing in Meridian and we have not been directed to file anything in it yet.

O Did you apply to the mississippi Federal Court for an order staying the respondents in this cause from continuing their prosecution of that lawsuit?

A No.

Q All right. And if your answer to that is no, can I then reasonably assume that no evidentiary hearing was conducted in connection with any such application since none was made?

A No application was made. There had been no hearings held except the one in Meridian, no further proceedings except the filing of your bond and your brief, and my request for additional time to file my brief.

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2 + 25 Camelia Builders Inc. and Farnale in Rankin County, Cause No. 8343, filed January 17th?

MR. KRASNOW: Objection, your Honor.

THE COURT: Is that the suit --

MR. KRASNOW: The State Court action.

MR. HUBBARD: May it please the Court another matter involved in the Federal lawsuit is that we want to show that Fidelity Mortgage Investors was in default under its obligation giving rise to this Deed of Trust at the time of the attempt to foreclose on the Deed of Trust.

MR. KRASNOW: Your Honor, I don't see the relevancy to the issue.

THE COURT: I don't either, but I will let it in.

What precipitated that lawsuit, do you know, Q Mr. Goodale?

Well, what lawsuit are we speaking about?

The Rankin County lawsuit. Q

Against Fidelity, against the owners and the lenders! is that correct?

Yes. Q

Well, it was precipitated by the fact that we had not been able to get paid.

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MR. KRASNOW: Your Honor --

THE COURT: You have your objection. The same ruling.

MR.KRASNOW: With respect to this particular question I do not believe the witness is in a position to be able to respond to the question as to whether or not FMI advanced funds. This is not the best evidence.

THE COURT: If he knows.

MR. KRASNOW: It is not relevant and it is a leading question.

MR. HUBBARD: Excuse me, your Honor, the question is whether or not he knows.

THE COURT: Do you know whether they advanced funds?

THE WITNESS: Your Honor, I have been in their offices a number of times to seek some solution to this money problem so I do know they were in fact advancing the money.

MR. KR ASNOW: Whose offices?

THE WITNESS: Fidelity Mortgage Investors in Jacksonville, Fla.

Will you, Mr. Goodale, tell the Judge whether Q or not you have had occasion to call Fidelity Mortgage

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Investors concerning payments on this contract?

A Yes sir, during the job before it was closed down the last time, about 100 times.

Q And did you call Jacksonville, Fla. or did Jacksonville, Fla. call you?

A Well, we had calls from Jacksonville, Fla. from Fidelity, but we also called Jacksonville, Fla. That is the only place I have any recollection of ever calling Fidelity Mortgage Investors to speak about this problem.

Q Do you know where the home office of Fidelity Mortgage Investors was located ?

A In Jacksonville, Fla.

Q When was the last time that you had occasion to communicate with Fidelity Mortgage Investors in Jacksonville, Fla.?

A I cannot give the exact date but my judgment, I would say, some time in September of 1974.

Q Were you ever advised, Mr. Goodale, either personally or as an officer of Farnale that Fidelity Mortgage Investors had filed a Chapter XI, a petition in Chapter XI for an arrangement, No. 75-B-154, in the United States District Court for the Southern District of New York?

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A The Houston area Wall Street Journal had on the front page of its January 31, 1975 edition four lines -- I still have the paper -- and it stated that Fidelity Mortgage Investors was seeking bankruptcy. There is more than one FMI, there is a First Mortgage Investors in Miami, Fla.

Q Did that report or article tell you in what court or what jurisdiction FMI had brought its Chapter XI arrangement proceeding?

A It did not even state it was a Chapter XI. It stated it was --

MR. KRASNOW: Your Honor, I have to object to this testimony.

THE COURT: Sustained.

Q Other than the newspaper article that you read in the Wall Street Journal about FMI, and the temporary restraining order and order directing the respondents to show cause why they should not be judged guilty of civil contempt that you received in this proceeding, have you received any other notice from the lawyers for FMI or from this court advising you of the existence of the Chapter XI proceeding?

A Well, I believe in Meridian, Miss. that Mr. Young had an article that was quite lengthy that he presented

to me and asked me if I had not seen this article.

Q Had you seen it?

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- A Not until that time, no sir.
  - Q Had you received any notice from the United States District Court for the Southern District of New York other than this order telling you to be here, advising you of the existence of this Chapter XI proceeding?
    - A No sir, I had not.
    - Q Do you know whether or not Farnale Inc. ever received some kind of a written notice, postcard, or letter, or something, from the law firm of Weil, Gotshal & Manges advising of the existence of this Chapter XI proceeding, Mr. Goodale?
    - A Well, at this time or at what time?
      - Q Let's say prior to April 1, 1975.
    - A Well, the only thing I have seen prior to

      April 1, 1975 is the papers, some of the papers relating
      to the suit in Mississippi on March 26, 1975, but no

      notice formally from the law firm that I know of.
    - Q Has your legal counsel ever advised you prior to March 28, 1975 at 9:40 a.m. that this Chapter XI proceeding was pending in this court
    - A I have no recollection of it.

Q Will you tell the Judge, please, whether or not it is licensed to do business in the State of Mississippi?

A Yes sir, it is.

Q Will you tell the Judge whether or not it is licensed to do business in any other State?

MR. KRASNOW: Your Honor, objection.

THE COURT: Sustained.

MR. HUBBARD: I pass the witness.

MR. KRASNOW: May we have a moment, your Honor.

THE COURT: Yes.

(Discussion held off the record.)

#### CROSS EXAMINATION

#### BY MR. KRASNOW:

Q Mr. Goodale, with respect to Farnale Inc., you are the president, I believe you so testified?

A - Yes, sir.

Q Will you please name the other officers of that company?

A You want officers?

Q That is correct.

A There is a gentleman by the name of Nelson Bogle, Mitchell Worley.

Q Will you please state what office they hold?

A Most of these individuals are vice presidents, some

are also assistant secretaries and that sort of thing, but generally speaking most of them are vice presidents.

Will you please continue?

J.W. Marsh, Nick S. Goade, and he I believe is the treasurer and vice president.

I don't know, we have had resignations and I don't know who the corporate secretary is at this point, but I am going to state that I believe Velma H. Goodale is the corporate secretary. Again I say with that reservation because there have been some resignations.

- Can you repeat the name again?
- Velma H. Goodale. A

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- Does she have any relationship to you?
- She is my wife.
- Could you please name each of the directors of the company?
- A Mr. Bogle, Mr. Marsh, Mr. Worley, Mr. Goade, and I believe there is one other but I do not know who that one is.
  - Do any of these individuals have any relationship to you?
    - A No, sir.

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Q Can you please name all the stockholders of the company?

MR. HUBBARD: I object to that, your Honor, and my motion for protection that this is a very complicated -- there are some very complicated litigations in the State of Texas concerning this but I will have no objection if he is asked whether or not he is a stockholder, but beyond that I really have to object.

THE COURT: I will sustain you.

- Q Are you a stockholder of the company?
- A No, sir.

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- Q Is your wife?
- A Yes, sir.
  - Q Is she a majority stockholder?

MR. HUBBARD: I will object to that too, your Honor, for the same reason.

THE COURT: Overruled.

Q Will you please answer the question?

MR. HUBBARD: I object for the further reason that majority stockholder is a question of law or what constitutes majority.

THE COURT: I do not believe so. He knows what it means.

Is she holding the major part of the stock?
THE WITNESS: Yes, sir.

	Q	You	indicated	you	are	the	president;	are	you
the	chief	exec	cutive off	icer	?				

A We do not have such a title. I am the president.

THE COURT: Who runs the company?

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THE WITNESS: Well, I think I pretty well call the shots, your Honor.

Q I believe you testified before that as president of the company you are familiar with litigation involved with Farnale?

A I generally know about the litigation. I am not legally trained and I don't know --

THE COURT: You said your lawyers would not bring a suit on your behalf unless you know about it.

THE WITNESS: Sir

THE COURT: Certainly your lawyers are not going to bring suit against some third party unless you know about it.

THE WITNESS: Well, I think it is a fairly broad statement --

THE COURT: Would you allow your attorneys
to bring suit against anybody that they pleased on
your behalf without consulting you?

THE WITNESS: Well, your Honor, in the

evert and Mr. Phillips, and -Goodale-cross construction business when you have a problem with an individual and you discuss it with your attorney there are some times required several lawsuits. Now, I do not specifically discuss each of those times. I ask the attorney to go do something about my problem. I am not trying to be evasive, your Honor, but that is my best answer. I cannot tell you anything more than that. Mr. Goodale, I recall your testimony is that you read an article in the Wall Street Journal, the Houston division, which said that an entity known as FMI filed a Chapter XI petition, is that correct? No sir, the article that I read made reference to a bankruptcy. It did not indicate whether it was a Chapter X, Chapter XI or whatever it might have been. It just made reference that it was four lines. Do you recall testifying at a hearing in the Mississippi District Court action on March 26, 1975? Yes sir, we talked about the article with Mr. Young. Do you recall being asked the question: "Q - Mr. Goodale, did you know that Fidelity Q Mortgage Investors was in bankruptcy?" And you responded: "I read an article in the Wall Street Journal dated January 31, 1975 which :4 15

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Goodale-cross

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indicated that was the fact. I believe it was some type Chapter XI proceeding. I am not exactly sure of the date but that is within a day or so of the actual date."

Did you so testify?

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A Now, you should read some more, I stated --

Q Mr. Goodale I asked the question: do you recall the question being asked and that response?

MR. HUBBARD: I think we ought to put the record --

THE COURT: You can put the rest of the record in when the times comes. You know the Rule. He can read part of the record and you have a right to complete it.

MR. HUBBARD: Thank you.

THE COURT: Go ahead.

A (Continuing) Do you have the transcript? I do not have a copy of it. I will take your word for it, yes sir.

MR. KRASNOW: Thank you.

Q Mr. Goodale, you indicated before that subsequent to the reading of that article you did not consider at all the article, you did not discuss it with any of your attorneys?

A What article are we speaking about?

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Q We are referring to the article that appeared in the Wall Street Journal on January 31, 1975 in the Houston edition.

A The Courier?

Q Yes.

A The question is did I discuss this with any of the attorneys?

Q With any of your counsel?

A I would have to say that I probably made a comment to Mr. Hubbard that I had noticed something in the paper referring to FMI, but a discussion, I don't actually have a recollection of it.

Q When you say FMI, do you recall whether you used those initials?

A I probably would have said Fidelity Mortgage
Investors, but I may not have. I don't know. There are two
FMIs and we have done work for both of those firms.

Q Referring again to the transcript of March 28th --

MR. HUBBARD: I object, your Honor. There is no transcript of March 28th.

MR. KRASNOW: Excuse me, March 26th. I apologize.

Q Do you recall being asked the question:

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"Q - Mr. Goodale, did you discuss the bankrupt's status as the defendant in this proceeding with the attorney for your company?

"A - No sir, I don't believe I ever sat
down and discussed it other than to say possibly
the Fidelity filed a Chapter XI."

Do you recall that answer?

A You are reading from the transcript and I have to take your word for it, yes sir.

Q I believe your testimony earlier was to the effect that you do not recall receiving any papers which in any way reflected that this Chapter XI petition was filed, any paper other than the Wall Street Journal article, is that correct?

A No. I think the question was from a law firm, Weil, Gotshal, whatever the name of the firm is.

O Do you recall receiving any papers from any other law firm other than Weil, Gotshal & Manges?

A I believe the only papers I have received is in connection with this hearing.

Q Did you at any time receive any papers from any law firm with respect to the Mississippi action which reflected that FMI had filed a Chapter XI petition, in either the State Court action or the Federal Court

Goodale-cross 1 action? 2 MR. HUBBARD: Your Honor, I do not follow the 3 question. Can we have it repeated? 4 MR. KRASNOW: I asked the witness whether or 5 not he had received any papers from any law firm in either the Mississippi State Court action or 6 7 in the Federal Court action which in any way reflected that FMI had filed a Chapter XI petition. 8 Counsel, I did receive some papers from Mr. Crockett's 9 office who represented Mr. Yelverton in the State action. A 10 Generally speaking they did send copies of it but I 11 12 just cannot say -- if you have some papers --13 Do you recall whether or not you saw the Plea and Abatement which was filed by FMI counsel in 14 15 the State Court action? 16 I believe I saw that in Jackson, Miss., and I ultimately received a copy of it after this hearing also, 17 18 I believe. 19 Which hearing? 20 After the one in Meridian, Miss. I might have seen a copy of it on my desk just prior to that because 21 I don't even remember the date of the Plea and Abatement, 22 23 or whatever you call it. Referring again to the testimony which you 24 25 55

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gave on the March 26th hearing, do you recall being asked the question:

"Q - You were aware a Plea and Abatement had been filed based upon the bankruptcy of FMI, were you not?"

And you responded: "Yes sir I got a copy of Mr. Scanlon's plea probably the first of this week."

Do you recall whether that was your answer?

I am sure it was, yes sir.

MR. KRASNOW: Your Honor, I believe that hearing was on a Wednesday so it would have been the 24th.

MR. HUBBARD: Judge, I really object to this line of questioning. We offered a copy of the Plea and Abatement. We offered that into evidence and that is an exhibit to our complaint if there is any question about that.

I object to the relevancy of this line of questioning.

MR. KRASNOW: Your Honor, Mr. Goodale testified on direct examination that he knew nothing about the FMI Chapter XI petition, knew nothing about it until we had served him with the application.

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### Goodale-cross

I believe that this testimony goes directly to that issue.

MR. HUBBARD: If it please the Court, the Plea and Abatement will speak for itself and this Court can determine from that whether or not Mr. Goodale has knowledge of this proceeding.

It is our position that the unverified Plea and Abatement, containing no exhibits or attachments thereto, and failed even to advise the cause number of this proceeding was simply not sufficient notice.

The Court, of course, will decide that question before this proceeding is done.

### CROSS EXAMINATION

# CONTINUED BY MR. KRASNOW:

Q Mr. Goodale, at the hearing held before the District Court in Mississippi on the 26th of March, did you sit in that courtroom at the time the argument was held before Judge Nixon?

## A Yes, sir.

Q Did you hear the attorneys argue the point concerning the FMI Chapter XI petition and the effect of Rule 11-44 on the lawsuit commenced on behalf of your company in the District Court?

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I don't remember the Rule that you speak of. I did hear the argument. I think I have said already that the papers relating to that hearing in the District Court, I mean in the U. S. Court in Meridian, I had seen those, I said except those papers.

Prior to the commencement of that proceeding? Prior to the March 26th hearing. I think I said except the papers relating to that.

Which papers are you referring to?

Well, you mentioned that Plea and Abatement and that was one of the papers that I referred to at that time.

And you say you saw that prior to the March 26th hearing?

I think I tried to make that statement. Of course, you can check the record.

MR. KRASNOW: That is all, your Honor.

REDIRECT EXAMINATION

BY MR. HUBBARD:

Mr. Goodale, will you tell the Judge, please, what is a Chapter XI petition in arrangement?

No sir, I have no idea.

Will you please tell the Judge what is a Rule 11-44?

pending in the United States District Court for the Southern District of New York?

A Right now?

Q Yes.

A Yes sir, I am very much aware of it.

Q Will you tell the Judge, please, when you first became aware of that fact?

A It was some time after we filed a suit in Meridian, Miss. to try to protect our lien on the property, that we were trying to collect money.

Q Do you know whether or not Camelia Builders Inc.
received a notice on or about or subsequent to
February 28, 1975 from this court advising of the
meeting of creditors in this Chapter XI proceeding?

MR. KRASNOW: Your Honor, counsel is asking a number of leading questions and at this point I must object.

THE COURT: What did you ask?

MR. HUBBARD: I asked whether he knows or not.

THE COURT: He can answer.

A No notice to my knowledge was ever received in February.

Q How about the first week or two in March of 1975?

A My first knowledge of Fidelity Mortgage Investors being in bankruptcy, in what is Chapter XI, of which I have had explained to me since that time, was when we got -- after we filed a suit in Meridian trying to protect that lien, is what the attorney told me.

Q Did you personally ever receive notice from this court advising you of the first meeting of creditors?

THE COURT: He said no.

A No.

Q Do you know whether or not Camelia Builders Inc.

ever received notice from this court advising that all

lawsuits were stayed and that the filing of the

Chapter XI proceeding operates as a stay from the commencement or continuation of any court proceeding?

A Mr. Hubbard, I received a phone call -- as a matter of fact I answered a phone call to New York on Friday after our Wednesday -- I was in court in Jackson on Wednesday, I could not go to Meridian. On Friday I had a telephone call that was left to me in New York and they said something about I was getting some papers about being in contempt of court regarding Chapter XI.

I asked them if they had phoned my attorneys and advised them because I was physically on a construction project site and I was returning phone calls from the

day before. They called my office in the late afternoon and I returned the call some time Friday. That was when I got notice of this, that they said I was being mailed a summons which I received and they told me to be here four o'clock yesterday afternoon, and that is why I am here.

Q Would that Friday have been about March 28,1975?

A If it was Friday after the Wednesday that I was in court in Jackson, that would have been the date.

Q Were you in court in Jackson, Miss. on the same Wednesday that Mr. Goodale went to Meridian, Miss.?

A Yes, sir.

Q Does March 26, 1975 ring a bell for that Wednesday?

A Yes sir, I was on the stand for six hours.

Q Then the first notice that you had of this proceeding, this Chapter XI proceeding came on a Friday following that Wednesday?

A Yes, sir.

MR. HUBBARD: I pass the witness.

CROSS EXAMINATION

BY MR. KRASNOW:

Q Mr. Yelverton, in what capacity are you employed by Camelia Builders?

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President.

What was the purpose of the incorporation of that entity?

It was for the purpose of forming a corporation which had no labor agreements to enter into a residential type project, which the Camelia Bay project was, and Camelia Builders Inc. has no union contracts that is a non-union type of operation.

So it is solely with respect to this particular project?

That's right. That is the only project Camelia Builders Inc. ever entered into.

With respect to the action which was commenced in the State Court of Mississippi in January of 1975 by Camelia Builders Inc., did you have any discussions with anybody with respect to that action prior to its being tried?

Yes, my joint venture partner over there. We filed a lien on the project, and we were told by counsel that in order to perfect your lien you had to file a suit within a certain period of time.

MR. KRASNOW: Will the record reflect that the witness is pointing to Mr. Goodale.

With respect to all legal matters in which Q

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Camelia Builders would be involved would you be the individual who would be familiar with that?

As well as I can with matters of law which I had counsel for.

Who is your counsel?

Mr. Crockett.

You had discussions with Mr. Crockett prior to the commencement of the State Court proceeding? Yes.

Did he discuss that proceeding with you at all during the course of that proceeding?

No, only whatever is necessary. I am not an attorney and we filed a lien and as a matter of fact he filed a lien for us. I executed the lien on the property. He told me that we need to file suit to protect the lien and we filed suit to protect the lien. That is what I am told.

Did you have any discussions with anybody prior to the commencement of the Federal District Court action with respect to that action?

MR. HUBBARD: I am sorry, I do not understand the question.

MR. KRASNOW: I will rephrase it.

. Did you speak to anyone prior to the commencement

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24 25 by Camelia Builders and Farnale Inc. of the District Court action?

Are you talking before Judge Nixon?

Before Judge Nixon with respect to that action? MR. HUBBARD: Excuse me. I want to interpose, if I may, your Honor, because I have not had a chance to talk to Mr. Yelverton, and I believe he should be advised that he has a right not to disclose any transaction that has taken place with his counsel.

Now, Mr. Goodale has willingly waived that in order to assist this Court in making its determination, but Mr. Yelverton should be made aware he may waive it or he has a right not to disclose any transactions that took place with his lawyer.

MR. KRASNOW: I am not asking him the nature of any discussion. I am asking whether or not he had any discussions.

THE COURT: That is allowable.

I am sure we talked about it because we had to decide whether Mr. Goodale would go to Meridian. I was subpoensed in court in Jackson.

Will you please name the parties with whom you

discussed that Federal action?

A Mr. Crockett, and Mr. Phillips, and I believe Mr. Hubbard and I believe Mr. Goodale was present there.

- Q Will you please identify Mr. Phillips?

  A He is with the law firm of Perry, Phillips,

  Crockett & Morrison in Jackson.
  - Q When did those discussions take place?

    That Wadnesday morning.
- Q Prior to the commencement of that action?

  A We had to be in court in Jackson at what time, ten o'clock -- and I believe it was a hearing before Judge Nixon at what time -- one o'clock, and it was some time between nine and ten o'clock on Wednesday morning.
- Q And that was the first time that you discussed that Federal court action with anyone, with any counsel that Wednesday March 26th?
- A Well, I am not trying to be evasive but I want to be specific and honestly do, and this Federal court action could have been mentioned the day before. Mr. Crockett and Mr. Hubbard were talking about this matter and I was brought in or tried to keep informed of what was going on, the sequence of events that were happening that week and I was primarily concerned with appearing in court on Wadnesday morning at ten o'clock.

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Did you know that that Federal court action would be commenced prior to that Wednesday?

If it was discussed in my presence --

MR. HUBBAR!: I object, your Honor. The record clearly shows the action was not commenced on Wednesday. The question is obviously designed to trick the witness.

MR. KRASNY: Your Honor, I take issue with that. We are not trying to trick the witness at all your Honor. All we are trying to do is determine when the winess first became involved in discussions relating to that Federal court action.

THE WURT: This does not require a speech.

It was / ther Tuesday or Wednesday. Again, I am not trying to be evasive. In the scope of everything that has happened you are asking me to pick out a specific moment there and I just --

As president of Camelia Builders you would be the 1/divid/al who authorized the commencement of Vasuits?

Yes.

Did you authorize either Mr. Crockett or Mr. Hubbard to commence that lawsuit?

I will have to assume responsibility for that action.

(Witness excused.)

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1	Hubbard-direct
2	THE WITNESS: It is in evidence and it speaks
3	for itself.
4	THE COURT: The complaint is in evidence.
5	THE WITNESS: The whole record is in evidence.
6	THE COURT: You will be repeating it.
7	THE WITNESS: Thank you, your Honor.
8	Q Mr. Hubbard, please tell his Honor when that
9	lawsuit was filed?
10	A The lawsuit was filed January 17, 1975.
11	Q Do you know whether or not FMI was served in
12	that lawsuit
13	A Yes sir, the record reflects that FMI was served on
14	or about January 28, 1975.
15	Q Do you know how they were served, Mr. Hubbard?
16	A Yes sir, they were served by serving the Secretary
17	of State in Mississippi and subsequently in Jacksonville,
18	rla.
19	Q Do you know why they were served in Jacksonville
20	Fla.?
21	A Yes sir, that is the home office of FMI and that
22	office is reflected on correspondence in my file.
23	MR. KRASNOW: Your Honor, I have to object to
2.	this testimony. It is totally irrelevant.
. 2	The Excuse me, your Honor. The

purpose of this testimony is to show that even when we had the notice in the Wall Street of the FMI Chapter XI New York, and their Plea and Abatement, we still don't know that that is the FMI that we have dealt with because our FMI is in Jacksonville, Fla.

Now, we don't care if FMI wants to come to

New York to file their Chapter XI, and I think if

I had a bankruptcy I would be honored if I could

be in this court, but the point is that FMI that

we know is in Jacksonville, Fla. and we have dealt

with them since the summer -- well, actually we

had our first dealings in March of 1972 --

THE COURT: Go ahead. I will overrule the objection.

THE WITNESS: Thank you.

A (Continuing) -- And a multitude of correspondence in my file shows that to be their address.

THE COURT: Did you have any communications with them in New York?

THE WITNESS: No sir, none.

When did you next hear of FMI?

A Around the end of January 1975 or the first of February 1975 I became aware of a small article that

1	Hubbard-direct 106
2	appeared on the front page of the Wall Street Journal.
3	Q Please tell the Court whether or not you know
4	that FMI was in Chapter XI by the 1st of February 1975?
5.	A I do not.
6	Q Please tell the Court why you don't know that
7	FMI is in Chapter XI when you read it in the Wall
8	Street Journal?
9	A No. 1 because the bankruptcy
10	MR. KRASNOW: Excuse me, your Honor. If the
11	witness is going to refer to the Wall Street
12	Journal article, that is the best evidence as to
13	the contents thereof.
14	THE WITNESS: I do not have the article, your
15	Honor, and it may be in my clients' possession.
16	Do you have the article with you, Mr. Goodale?
17	MR. GOODALE: No, I do not.
18	THE COURT: Go ahead.
19	A (Continuing) That makes reference, as I understoo
20	it, to a bankruptcy in New York.
21	THE COURT: I would ask counsel to get me a
22	copy of that article in the Wall Street Journal.
23	MR. KRASNOW: Yes, your Honor.
24	THE COURT: That would be deemed marked in
25	avidance se a Court subthite

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(Article in the Wall Street Journal referred to to be desmed marked in evidence as the Court's Exhibit.)

A (Continuing) -- No. 2, I am not impressed by the articles I read in the Wall Street Journal --

THE COURT: Strike that out -- whether you are impressed with it or not.

THE WITNESS: Yes sir, but the reason I offered that is to show my good faith in whether I relied or not relied on the notice in that article.

THE COURT: I won't allow it. If you chose not to believe it that is your problem and that is not this Court's problem.

THE WITNESS: Yes sir. May I have an opportunity with two quick questions to make my record on that point, your Honor?

THE COURT: No, I won't allow you to go any further on that.

THE WITNESS: Thank you.

Q After you had read the article in the Wall Street Journal, Mr. Hubbard, did you have occasion to make investigation to determine whether or not FMI was in fact in a bankruptcy proceeding or a Chapter XI proceeding in New York?

attorneys for FMI. by kichard r. krashow and FMIIIP m.

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Yes sir, I did.

Q Please tell the Court what your investigation consisted of?

A I contacted Mr. Tom Crockett, my co-counsel, my
Mississippi counsel, in Mississippi, concerning the
article because it appeared that it may have some effect
on the lawsuit filed in Rankin County, Cause No. 8343,
and I suggested to him it appeared appropriate to
determine whether or not FMI was in fact in a bankruptcy
proceeding.

Q Did you hear subsequently from Mr. Crockett concerning his investigation?

A No sir, I did not.

Q What did you do next, Mr. Hubbard?

A After some several weeks I had occasion again to call Mr. Crockett and again I asked him whether or not he had investigated the Chapter XI proceeding. After that conversation --

MR. KRASNOW: Your Honor, I am not sure exactly when these telephone calls took place.

THE WITNESS: I am not either. It was some several weeks later, at least two or three weeks.

THE COURT: After what?

THE WITNESS: After the lat of February, your

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MR. KRASNOW: Thank you.

Honor.

A (Continuing) After that conversation I again asked Mr. Crockett to make an investigation to see if FMI was in Chapter XI proceedings or any other bankruptcy proceeding.

THE COURT: Who is Mr. Crockett?

THE WITNESS: He is the lawyer who was representing Camelia Builders and Farnale in their Rankin County lawsuit.

THE COURT: I would have inquired of FMI,

if I were you. That is where I would have looked

if I were you.

THE WITNESS: Thank you.

THE COURT: Don't thank me. I did not do anything. I am telling you what I would do if I were in similar circumstances.

If you did want to find out about it I could have suggested a dozen other places.

Off the record.

(Discussion held off the record.)

THE COURT: Now, let's go ahead.

Q After that conversation did you again have occasion to have a conversation with TMr. Crockett

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concerning the FMI bankruptcy?

Yes, I did.

Q When was that?

That was some several weeks again later which would have been -- at least in the 1st of March of 1975 and perhaps even towards the middle of March. At that time I asked Mr. Crockett has it been determined whether or not FMI is in Chapter XI and his reply was --

MR. KRASNOW: Objection, your Honor, hearsay.

THE WITNESS: It is a fact.

THE COURT: Hearsay.

THE WITNESS: May I have a chance to make a record on this answer?

THE COURT: No.

After your conversation with Mr. Crockett, Q Mr. Hubbard, did you believe that FMI was in a Chapter XI No sir, I was satisfied they were not.

When was your attention next drawn to FMI? On or about March 19th or 20th, I cannot recall the exact date, I had occasion to go to Jackson, Miss., to talk with Mr. Tom Crockett concerning the legal matters that were going on there. At the time when I got to Jackson, Miss., I was presented with a Plea and Abatement that had been filed on behalf of FMI in the

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Rankin County lawsuit. What did you do based upon the receipt of the information of the Plea and Abatement?

I did nothing at that moment because I was in Jackson, Miss. and a long way from home. Later that night we returned to Houston and I was in Houston on March 21, 1975.

At that time I called the office of the District Clerk of the Southern District for the United States District Court of New York, and the first call no one answered; the second call I made later in the afternoon I asked whether or not FMI was in a Chapter XI proceeding. I was asked what was the cause number. I said I did not have the cause number and the lady said we cannot help you.

Later in the afternoon I again called the District Clerk's Office for the United States Court, Federal District Court for the Southern District of New York and got another lady on the phone. I explained my problem to her and that I simply had to determine whether or not there was a Chapter XI proceeding. She advised that without the case number she could not help but if I would call back Monday there would be someone who could look up the case number for me, look it up apparently by name and then find whether there was a case number or

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something. I did not quite understand it.

THE COURT: When was this?

THE WITNESS: This was late in the afternoon of March 21, 1975.

Q Mr. Hubbard, who made the decision to file the lawsuit in Jackson, Miss. on March 24, 1975?

A I did.

Q Did you discuss the filing of that lawsuit with Mr. Goodale or any representative of Farnale?

A No. I did not.

Q Why didn't you discuss the matter of the filing of the lawsuit with Mr. Goodale or Mr. Farnale?

A I had been retained in this matter as I recall in April of 1973 initially to watch over the efforts of the corporation to complete this project for the reason that it was running very substantially in the red.

By October of 1974 Farnale was owed a very substantial sum of money and had received only a partial payment and at that time Mr. Goodale asked me if I would do whatever could be done to minimize the losses of Camelia Builders Inc. and Farnale Inc.

Thereafter I undertook to do all acts which in my judgment appeared to be appropriate and only advised Farnale Inc. and Mr. Goodale after the fact of each

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action that I had taken.

I did discuss with Mr. Goodale on March 24, 1975
that I was taking action in connection with the
disclosure of the fact by Mr. Crockett to Mr. Goodale
and myself on the Thursday before, I believe, March 20th
concerning the foreclosure by FMI, but all I told him
was I am going to do something about that.

I was left in the situation that at the close of business on March 21, 1975 that there was a foreclosure going on in Mississippi by Deed of Trust which I was advised by my Mississippi counsel was contrary to Mississippi law.

I think that I was under a duty at that time to make inquiry whether or not there was a Chapter XI proceeding pending and I was attempting to make that inquiry, but I had not been able to do so.

Immediate action was required in connection with the foreclosure because I was advised by my counsel in Mississippi that the Deed of Trust sale could cut off the mechanic's and materialmen's lien.

Therefore, under the pressure of the time that was presented to me I could see no alternative other than to try to hedge the bet and say that either FMI was in Chapter XI or they were not.

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If they were not in Chapter XI I had a diversity jurisdiction to file in the Federal Court; if they were in Chapter XI I felt I had a lawsuit under 28 USCA 959 to bring in the Federal Court.

In the alternative, in the event that I did nothing and it was subsequently determined that FMI had no Chapter XI, and that my Mississippi counsel was correct, then my client would have lost the \$75,000, or in the event I went back to the State Court and it should subsequently be determined that FMI was in Chapter XI, then it appeared to me there would be a question whether or not I had violated Rule 11-44, and for those reasons on Sunday, March 23rd, I prepared the complaint to be filed in the Mississippi Federal Court, and sent it by messenger, by airplane, to Mr. Tom Crockett on the evening of March 23rd. Mr. Crockett advised me that he received it on March 24th and that he filed it the same day.

Q What did you do further to determine the existence of the Chapter XI proceeding?

A On March 24, 1975 I again called the office of the Clerk of the United States District Court for the Southern District of New York and made inquiry. At that time I was given by the Clerk the cause number.

Hubbard-cross 1 113 2 CROSS EXAMINATION 3 BY MR. KRASNOW: 4 Mr. Hubbard, I believe it is your testimony Q that on or about March 19 of this year you received a 5 copy of the Plea and Abatement which is an exhibit before 6 this Court and which was filed in the Mississippi State 7 Court action; is that correct? 8 I don't recall the date, counsel. I remember that 9 I received a call from Mr. Crockett that we had to come 10 over to Mississippi to talk about the lawsuit which had 11 been filed by the sub-contractors. 12 Whether I went there on Wednesday or Thursday, 13 I cannot recall, but I am thinking it was a Thursday 14 which may have been March 20th and I think that is more 15 probably right than not, but it might have been 16 March 19th. 17 On or about March 20th you received a copy of 18 the Plea and Abatement? 19 20 Yes, sir. Did you read the Plea and Abatement? 21 Q Yes, sir. 22 After reading that did you note the name of 23 FMI counsel in the Mississippi State Court action? 24 I don't recollect, counsel. We have that in evidence 25

Hubbard-direct

I asked the Clerk to please furnish me with a copy of the petition, the plan, if any, and copies of all orders entered in the case. She told me she would do that and it would cost approximately 50 cents to \$1 per page. It asked her if \$200 would sover the cost and she said "Oh, no, about 15 to \$20, all that is on file is a petition which was filed January 30, 1975."

I asked her did there not have to be an order for a debtor-in-possession when we were talking about a period almost two months later and she replied "There are no other papers other than the petition, there are no orders on file in this case."

Whereupon I sent the lady a telegram on the afternoon of March 24, 1975 requesting her to send what she had, and she sent me the petition which I received on March 28, 1975.

At no time have I ever received an order of this court dated February 28, 1975.

At no time have I ever received from this court notice of the first meeting of creditors.

At no time have I received from this court advice concerning the Rule 11-44.

Q As a practicing attorney, Mr. Hubbard, do you have an opinion whether or not Rule 11-44 may not be

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though so we know what it shows. (Witness examines papers.) Yes, it shows. As a matter of fact, Mr. Pat Scanlon. That is the same lawyer who filed the mechanic's and materialmen's lien on behalf of the sub-contractors.

Does that Plea and Abatement indicate the Q address of FMI special counsel?

Yes sir, it does.

Do you recall where Mr. Crockett's office is located?

Not offhand but I do have his address available to me all the time, and I believe he is on the 7th floor of some bank building in Jackson, Miss.

Would it be the Deposit Guaranty Bank Bldg.? Well, it may or may not be. It is a bank building in Jackson, Miss. and it is on the 7th floor.

It is in the same city where FMI's local counsel is located?

Well, that is the address on that, yes.

After reading this Abatement did you call FMI's special counsel?

After reading that Plea and Abatement, counsel, I was stunned. Frankly --

THE COURT: He did not ask anything else.

1	Hubbard-cross 120
2	Q I asked you whether or not you contacted Mr.
. 3	Scanlon or anyone else of that law firm of Young &
4	Scanlon?
5	A No, sir.
6	Q You indicated that thereafter you made several
7	calls to the clerks' office here in the Southern District
8	of New York; did you make any calls to FMI?
9	A To FMI in Jacksonville, Fla.?
10	Q Yes?
11	A No, sir.
12	Q You did not attempt to contact them to
13	verify it?
14	A I didn't know whether anyone in my office did that
. 15	but I did not. The only calls I made was to the clerks
16	office here in New York.
17	Q I believe you testified that on March 24th
18	you were advised by someone in the clerks' office in the
19	Southern District of New York that FMI had filed a
20	Chapter XI here, is that correct?
21	A Yes, sir.
22	Q Upon being advised of that did you examine the
23	Rules of Bankruptcy Procedure at all?
24	A I am not sure I understand your question. Do you
25	mean after the clerk told me there was a petition on file
	01
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did I get out Rule 11-44 and read it? Yes. Q 4 No, sir. You never read Rule 11-44? 5 No sir, I did not say that either. 6 MR. KRASNOW: I withdraw the question. 7 Prior to the commencement of the Federal Court 3 action in Mississippi did you and subsequent to your 9 determining that FMI filed a Chapter XI petition, did 10 you at any time review 11-44, the Rule referred to in 11 the Plea and Abatement? 17 Yes, sir. 13 So prior to the commencement of the Mississippi action you were familiar with the provisions of Rule 11-4-? 15 THE COURT: He said he was. He said he was 15 but he went ahead because he thought it was under 959. 11 He said he was familiar with 11-44 but proceeded according to his previous testimony because he falt 19 this action fell within Section 959; is that correct? THE WITNESS: Yes, sir. 21 MR. KRASNOW: No further questions. 22 MR. HUBBARD: I pass the witness, sir. 23 May I be excused? THE COURT: Yes. 25 (Witness excused.)

1

JOHN HOWARD SHOWS

BEST COPY AVAILABLE

Sworn to and subscribed before me, this 26 day

of March, 1975.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SDANY

In re

FIDELITY MORTGAGE INVESTORS,

Debtor,

FIDELITY MORTGAGE INVESTORS.

Bankruptcy No. 75 B 154

Applicant,

-against-

CAMELIA BUILDERS, INC., E. J., YELBERTON, JR., FARNALE, INC., R. L. GOODALE AND JEFFREY H. HUBBARD,

----X

Respondents.

ORDER UNDER BANKRUPTCY RULE 920(a)(4)
ADJUDGING PESPONDENTS GUILTY OF CIVIL CONTEMPT

:

Fidelity Mortgage Investors ("Fiti"), debtor-inpossession, having applied to the bankruptcy court on
March 27, 1975, for a certificate of facts and an order under
Rule 920 of the Rules of Bankruptcy Procedure, and a hearing
having been held on August 19, 1975, after due notice, on the
order of the Honorable Asa S. Herzog, Bankruptcy Judge, requiring
Camelia Builders, Inc., E. J. Yelberton, Jr., Farnale, Inc., R. L.
Goodale and Jeffrey H. Hubbard (the "Respondents") to show cause
before this court why they should not be adjudged in civil
contempt by reason of the facts set forth in the certificate

July 29, 1975, and after hearing Weil, Gotshal & Manges, attorneys for FMI, by Richard P. Krasnow and Philip H. Kalban, of counsel, in support of the application, and Jeffrey H. Hubbard, as attorney for Respondents, in opposition thereto, and it appearing from the Certificate of Facts that Respondents willfully and intentionally violated the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure, and upon the affidavits, previously submitted, of George C. Black, Jr., sworn to on August 8, 1975, setting forth FMI's actual and necessary costs and expenses incurred in connection with the contempt proceedings herein, a copy of which affidavit is annexed hereto as Exhibit "A," and of James Leon Young, a member of the firm of Young, Young & Scanlon of Jackson, Mississippi, special counsel to FMI, sworn to August 12, 1975, certifying the actual and necessary fees, costs and expenses incurred by said firm as a result of the conduct of the Respondents and the contempt proceedings herein, a copy of which affidavit is annexed hereto as Exhibit "B," and upon the affidavit of Michael L. Cook, a member of the firm of Weil, Gotshal & Manges, attorneys for FMI, sworn to January 5, 1976, setting forth the actual and necessary fees, costs and expenses incurred by said firm in connection with the contempt proceedings herein, which affidavit is annexed hereto as Exhibit "C," it is

ORDERED, ADJUDGED AND DECREED that Respondents are in civil contempt of court by reason of their commencement of the action entitled <u>Camilia Builders</u>, <u>Inc. et al.</u> v. <u>Fidelity Mortgage Investors</u>, currently pending before the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] (the "Mississippi Action"), in violation of the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure; and it is further

ORDERED that Respondents be, and they hereby are, directed to take forthwith any and all actions necessary to effectuate the return to FMI, as debtor-in-possession, of the \$75,964.33 deposited by FMI in the Mississippi Action; and it is further

ORDERED that Respondents be, and they hereby are, jointly and severally directed to pay to the entities designated below the costs, including attorneys' fees, incurred by FMI in connection with the Mississippi Action and the contempt proceedings herein, as hereinafter set forth:

FMI P.O. Box 52597 Jacksonville, Florida 32201 \$ 283.05

Young, Young & Scanlon
Special Counsel to FMI
930 Deposit Guarantee
National Bank Building
Jackson, Mississippi 39201

Weil, Gotshal & Manges Attorneys for FMI 767 Fifth Avenue New York, New York 10022

Fees - \$ 15,075.00 Disbursements - \$ 671.19

Dated: New York, New York January 15, 1976

( KICHMAD OWEN

RAYMOND F. EUCHSTON, Clerk

By Echsolic

Deputy Clerk

## UNITED STATES DESTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In the Matter

-of-

In Bankruptcy

FIDELITY MORTGAGE INVESTORS, :

No. 75 B 154

Debtor.

DECISION OF PROCEEDING TO CERTIFY FOR CONTEMPT

## APPEAPANCES:

CHARLES SELIGSON, ESQ., and
WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Debtor
By: RICHARD P. KRASNOW, ESQ., and
MICHAEL Z. BROWNSTEIN, ESQ.,
Of Counsel

JEFFREY H. HUBBARD, ESQ., and ELI S. SILBERFELD, ESQ., Counsel for Respondents

## ASA S. HERZOG, Bankruptcy Judge:

On January 29, 1975, Fidelity Mortgage Investors,

(hereinafter FMI), a Massachusetts real estate investment

trust, filed its petition in this court for an arrangement

under Chapter XI of the Bankruptcy Act and was duly authorized

to continue the conduct of its business. The filing of said petition promptly brought in to play Rule 11-44 of the Rules of Bankruptcy Procedure. That rule, insofar as applicable reads:

"(a) Stay of Actions and Lien Enforcement.

A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

on March 24, 1975, Camelia Builders, Inc. (Camelia) and Farnale Inc., (Farnale) a joint venture, commenced an action against FMI in the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)]. (hereinafter the "Mississippi action."] The respondents Hubbard and Crocket, are counsel for Camelia and Farnale and for the joint venture and instituted the aforesaid action on their behalf. The respondent Yelverton is an employee at Camelia.

<sup>\*</sup> The complaint has been withdrawn as against the respondent Crocket.

In 1972, a corporation known as Camelia Bay Corporation entered into a construction loan agreement with FMI to secure the financing of the construction of a certain project. When work on the project freased, the joint venturers, as general contractors of the project, filed a lien and instituted suit in the Rankin County, Mississippi, Circuit Court to enforce the lien and for a monetary judgment. In March 1975 FMI sought to foreclose its lien on the project by power of sale - a non-judicial foreclosure sale.

The action in the United States District Court (the Mississippi action) sought an order: (1) enjoining FMI from proceeding on March 28, 1975 with the non-judicial sale; (2) declaring the contractors' alleged mechanic's and materialmen's lien for services purportedly rendered prior to institution of this Chapter XI case in the amount of \$75,964.33, to be superior to the lien of FMI, and, if the foreclosure sale were not enjoined, (3) requiring FMI to turn over to the contractors the proceeds of the sale to the extent of \$75,964.33.

Thereupon, FMI, as plaintiff commenced this adversary proceeding for an order adjudging the respondents guilty of

civil contempt for wilful violation of the automatic stay of Rule 11-44 and for a certification to the district court pursuant to Rule 920, and for a judgment awarding costs for the expenses incurred as the result of respondents conduct, including reasonable counsel fees.

Section 41 of the Act (11 U.S.C. §59) provides that

"A person shall not, in a proceeding before a referee, (1) disobey or resist any lawful order, process or writ. . . "

Rule 920, relating to contempt committed in proceedings before a referee gives the referee the power to summarily punish for contempt, but limits the punishment which may be meted out to a fine of \$250. However, Subdivision (a)(4) of the Rule provides:

"(4) Certification to District Judge. If it appears to a referee that conduct prohibited by §41a of the Act may warrant punishment by imprisonment or by a fine of more than \$250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence."

The plaintiff, FMI, in its complaint seeks a certification to the district judge. In my view, if indeed a wilful disobedience of the stay provisions of Rule 11-44

occurred, the misbehavior is grave enough to warrant certification to a district judge. If Rule 11-44 is to serve its purpose, a wilful and deliberate violation of its provisions cannot be countenanced and should result in more than the limited punishment permissible under Rule 920.

There is no doubt that the respondents were fully aware of the pendency of the Chapter XI case in this court. Goodale, president of Farnale testified that he read The Wall Street Journal news item which boldly reported the filing of the petition of "Fidelity Mortgage, a sizable real estate investment trust," and "made a comment" of it to respondent Hubbard. Mr. Hubbard testified he had conversations concerning the FMI bankruptcy situation before institution of the Mississippi action, and that he made several calls to the Clerk of the District Court in New York. At the very least, Mr. Hubbard was under a duty to make inquiry, as he freely admitted, but decided to "try to hedge my bet" (Smp 113) and take a chance on violating Rule 11-44 (Smp 114). He made no effort to make direct contact with or inquiry of FMI. Mr. Hubbard was well aware of Rule 11-44, but took his chance

that his action would fall within 28 U.S.C. §939. Under no circumstances can he assert that his action and that of his clients were inadvertent or due to mistake or ignorance of the facts.

On the evidence adduced before me and the exhibits introduced in evidence, I am constrained to find that in instituting the Mississippi action, the respondents wilfully and deliberately violated the stay provisions of Rule 11-44, or, at the very least, treated the Rule so cavalierly as to constitute a complete disregard for the consequences of their conduct.

Mr. Hubbard testified that "I felt I had a lawsuit under 28 U.S.C. §959 to bring into the Federal Court" and indeed, he relies upon that section of the United States Code to relieve himself of responsibility for violation of the stay. From all the circumstances of the case, my distinct impression is that 28 U.S.C. §959 was an afterthought brought to light after the event for the purpose of justifying the deliberate violation of the stay provisions of Rule 11-44.

28 U.S.C. §959 insofar as is relevant, provides:

a. Trustees, receivers or managers of any property, including debtors-in-possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. [Emphasis supplied.]

Respondents' reliance on 28 U.S.C. §959 is misplaced.

This section was intended to create a general exception to the rule that suits against receivers and trustees may not be brought without leave of the court. Vass v. Conron Bros. Co., 59 F.2d 969, 970 (2d Cir. 1932). But the exception is limited to actions directly related to acts or transactions of receivers and trustees "in carrying on the business" connected with the property entrusted to them. See Austrian v. Williams, 216 F.2d 278 (2d Cir. 1954) cert. den. 348 U.S. 953 (1955); In re

In the last mentioned case the court said:

"The exception created in 28 U.S.C. §959(a) is intended to permit actions redressing torts committed in furtherance of the bankruptcy business operations, and is not cast to foster interference '[with] the use, control, maintenance and operation of the bankrupt's property. . ."
(Emphasis added.)

The difficulty with respondents' position is that the Mississippi action brought by them is not at all related to the operation of FMI's business. FMI, a real estate investment trust, was engaged in advancing money for construction projects and its proposed foreclosure sale was not concerned with the operation of its business. FMI, as a debtor in possession, by virtue of §342 of the Bankruptcy Act "shall have all the citle and exercise all the powers of a trustee appointed under this Act. . . " It was not part of FMI's business to foreclose mortgages, but it was FMI's duty and obligation to preserve and protect the debtor's rights, title or interests in property. The distinction was clearly pointed out in American Brake Shoe & F.Co. v. Interborough R. T. Co., 10 F. Supp. 512 (S.D.N.Y. 1935) wherein Circuit Judge Julian Mack pointed out that §66 of the Judicial Code (now 28 U.S.C. §959) "does not embrace suits intended to establish liens or possessory or ownership rights in the receivership res." A stay of the foreclosure sale, or a declaration that respondents have a lien superior to FMI, or requiring FMI to turn over \$75,964.33 would be "as much an interference with the administration of that property as a decision on questions of title and possession of the res."

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The respondents, by instituting the Mississippi action, were attempting to protect a pre-petition indebtedness by enforcing a mechanic's lien, an action totally unrelated to operation of the debtor's business. This is borne out by the suit previously instituted by the respondents in the Circuit Court of Rankin County, Mississippi, in January 1975, prior to the filing of the Chapter XI petition, in which they sought to enforce their alleged mechanic's lien and obtain a money judgment--relief strikingly similar to the relief sought in the other Mississippi action.

I must conclude that the nonjudicial foreclosure sale was a necessary step in protecting and administering the estate, a duty imposed on a debtor in possession whether or not authorized to operate the business.

Bankruptcy Rule 610, made applicable to Chapter XI cases by Rule 11-57, reads:

"The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal." (Emphasis added.)

Thus, the debtor in possession, even had it not been authorized to conduct the business, could without court approval commence any action or proceeding on behalf of the estate.

Surely, its duty to preserve the estate required that it enforce its lien by whatever means available, and here it elected to proceed by nonjudicial sale. Such action, it must be reiterated, is unrelated to "conduct of the business" in the usual sense of the term.

In <u>Austrian</u> v. <u>Williams</u>, 216 F.2d 278 (2d Cir. 1954) cert. den. 348 U.S. 953 (1955) it was held that a suit by trustees against debtor's officers, directors and stockholders charging them with various derelictions in management, constituted the collection and liquidation of assets and was not "carrying on business."

"Merely to attempt to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term."

The debtor's mortgage or lien on the property subject to the proposed nonjudicial sale is a property interest subject to the jurisdiction of this court, and respondents by the Mississippi action seek to subordinate the debtor's lien

to their own, clearly an action against property in <u>custodia</u>

legis. A proceeding to "determine the validity, priority

or extent of a lien or other interest in property" is an

adversary proceeding governed by Part VII of the Bankruptcy

Rules [Rule 11-61(a)(2)] and commenced by a complaint and a

summons issued by the Bankruptcy Court. [Rule 11-61 and Bankruptcy Rules 704, 705.]

Institution of the Mississippi action required the permission of this court. 28 U.S.C. §959 was not intended to allow such suits to be brought without leave of the court which has the property in its custody. As pointed out in American Brake Shoe and Foundry Co. v. Interboro R. T. Co., supra, any other conclusion could only lead to conflict and confusion in administration. Such was not the legislative purpose. In fact just such a conflict has arisen between this court and the Mississippi District Court where the District Judge is graciously awaiting a decision from this court as to jurisdiction of the res.

Rule 11-44 is broadly drafted and pervasive. It stays commencement or continuation of any "court proceeding"

against the debtor, or any "act or the commencement of any court proceeding to enforce any lien" against his property. The Mississippi action violates the very root of the rule: It seeks not only to stat the debtor in possession from performing its statutory duty to protect its interest in the property, but seeks to have its lien declared superior to that of the debtor's, and to aggravate matters, it seeks an order to the effect that if the nonjudicial sale proceeds, the debtor in possession "turn over" \$75,964.33. There is no doubt that the rule has been violated.

I have already stated my finding that the respondents instituted the Mississippi action knowing full well that a Chapter XI proceeding was pending in this court. Giving the kindest interpretation to Mr. Hubbard's testimony, he knew at the very least that some kind of a "bankruptcy" case was pending. He was also well aware of the automatic stay provisions of the Bankruptcy Rules. But he chose to proceed, gambling that he would fall with 28 U.S.C. §959. I think he played fast and loose with the Rules by, in his own language, "hedging his bet." It only indicates to me a contemptuous attitude to Rules which have the sanction of

the Supreme Court and of the Congress of the United States.

I don't think there is room for hedging.

The rule is equivalent to an order of the court and if acts are done in clear contravention thereof, the intention is of no consequence. As the court said in <u>In re</u>

<u>American Associated Systems</u>, <u>Inc.</u>, <u>supra</u> at p. 979:

"The absence of wilfulness does not relieve an individual from civil contempt since it is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the individual."

See also N.L.R.B. v. Ralph Printing & Lithographing Company, 433 F.2d 1058, 1062 (1970), cert. den. 401 U.S. 925 (1971).

This court is loathe to certify an attorney for contempt but if an attorney will not recognize and honor the obligation to obey the automatic stay provisions of the Rules, how could laymen be expected to do so. As an officer of the court the duty falls on the attorney to counsel his client that respect for the law requires the rules of the court cannot be ignored. The respondent cited Maness v. Meyers,

U.S. \_\_\_\_\_\_\_\_, 95 S.Ct. 584 (1975) to support his position but overlooks Chief Justice Berger's statement:

"A lawyer who counsels his client not to comply with a court order during trial would, first, subject his client to contempt, and in addition, if he persisted the lawyer would we exposed to sanctions for obstructing the trial." 42 L.Ed. 2d at 584.

Proper conduct on Mr. Hubbard's part would require that he either apply to this court for leave to institute suit in Mississippi, or alternatively, to annul, vacate or modify the automatic stay, a procedure for which ample provision is made in Rule 11-44.

Under all the circumstances I conclude that the respondents are guilty of a contempt of this court and that a certificate should issue to the district judge. The respondents will be stayed from proceeding with the Mississippi action pending ultimate disposition of such certificate. The certificate shall contain recommendations that pursuant to Bankruptcy Rules 914 and 754(b) the district judge impose the costs incurred by the debtor in possession in connection with the Mississippi action in this proceeding should include reasonable counsel fee.

Settle order in conformity with the foregoing on 10 days' notice.

Dated: New York, New York
July / 1, 1975.

Bankruptcy Judge

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payment to the general community

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In. re

FIDELITY MORTGAGE INVESTORS,

Debtor.

: Arrangement No. 75 B 154

PIDELITY MORTGAGE INVESTORS,

Applicant.

-against-

CAMELIA BUILDERS, INC., E.J. YELBERTON, JR. FARNALE, INC., F.L. GOODALE, JEFFREY H. HUBBARD, and THOMAS W. CROCKETT, JR.,

Respondents.

TEMPORARY RESTRAINING ORDER AND ORDER
DIRECTING RESPONDENTS TO SHOW CAUSE WHY
THEY SHOULD NOT BE ADJUDGED GUILTY OF
CIVIL CONTEMPT

Upon the annexed application of Fidelity Mortgage
Investors, ("FMI"), debtor-in-possession, dated March 27, 1975,
for an order adjudging the above-named Respondents ("Respondents")
guilty of civil contempt, and it appearing from the annexed application that FMI will suffer immediate and irreparable harm unless,
pending a hearing on the instant application, Respondents are
temporarily restrained from continuing the prosecution of an
action entitled <u>Camelia Builders</u>, Inc. et al. v. <u>Fidelity Mortga</u>

Investors, now pending in the United States District Court for the Southern District of Mississippi, and it appearing from the annexed application that the Respondents have been given notice thereof and that no other notice need be given, and no adverse interest having been represented, and sufficient cause appearing therefor, it is

ORDERED that Respondents be, and they hereby are, directed to show cause before me in Room 234 of the United States Court House, Foley Square, New York, New York on the 10th day of 1975 at 4 o'clock in the 10th noon of that day, or as soon thereafter as counsel may be heard, why they should not be adjudged guilty of civil contempt; and it is further

ORDERED that pending a hearing on the annexed application,
Respondents, their agents, servants and employees be, and they
hereby are, enjoined from continuing the Mississippi action
against FMI and its property; and it is further

ORDERED that pending a hearing on the annexed application, Respondents, their agents, servants and employees be, and they hereby are, enjoined from taking any steps to implement the terms of the order entered in the Mississippi action against FMI, and it is further

ORDERED that answering papers, if any, shall be served upon Weil, Gotshal & Manges, attorneys for FMI, 767 Fifth Avenue, New York, New York, 10022, no later than two (2) days preceding the return date set forth above; and it is further

conduct of Respondents, and its ability to continue operating as debtor-in-possession will be substantially impaired if it is

(a) required to defend the Mississippi Action and (b) deposit the sum of \$75,000 with the Mississippi Federal Court.

### The Relief Requested

- Il. In view of the foregoing, applicant requests that
  Respondents be adjudged guilty of civil contempt and that, pending
  a hearing on this application, the Respondents be specifically
  stayed from continuing their prosecution of the Mississippi Federal
  Action and from taking any action to implement the terms of the
  order of the Mississippi Federal Court.
- 12. Applicant also requests reimbursement from the Respondents, jointly and severally, for all of its actual costs, expenses, disbursements and attorneys' fees necessarily incurred in defense of the Mississippi Federal Action, and in obtaining the relief sought herein.
- by notice of motion because of the urgency of the situation and because any further delay will cause the estate additional injury and expense.
- 14. No previous application for the relief sought herein has been made to this or any other court.

of creditors has been designated and is represented by Messrs.

Wachtell, Lipton, Rosen & Katz, 299 Park Avenue, New York, New

York, and notice of this application will be given to that

committee.

16. Prior to the filing of this application, applicant communicated by telephone or by telegram with Respondents and their counsel, and among other things, informed them that an application for a temporary restraining order would be sought pending a hearing on this application.

17. Upon information and belief, the addresses and telephone numbers for each of the Respondents is as follows:

Camelia Builders, Inc., and E.J. Yelberton, Jr. 2373 Twin Lakes Circle Jackson, Mississippi (601) 948-4233 (601) 982-2611

Farnale Inc. and R.L. Goodale P.O. Box 55347 Houston, Texas (Telephone Number - Unknown)

Jeffrey H. Hubbard, Esq. Attorney for Respondent 2297 Two Shell Plaza Houston, Texas 77002 (713) 225-0837

Thomas W. Crockett, Jr., Esq.
Attorney for Respondents
Deposit Guaranty National Bank Building
Jackson, Mississippi 39205
(601) 948-8820
WHEREFORE, applicant prays that the court adjudge

Respondents in contempt of its lawful order, or, in the alternative,

contumacious conduct and enter an order directing Respondents to appear before a District Judge to show cause why they should not be adjudged in contempt by reason of the facts so certified, and that Respondents, jointly and severally, reimburse applicant for its actual costs, expenses, disbursements and attorneys' fees necessarily incurred in defending the Mississippi Action and in obtaining the relief sought herein, and that applicant have such other and further relief as is just.

Dated: New York, New York March 27, 1975

> WEIL, GOTSHAL & MANGES and CHARLES SELIGSON Attorneys for Fidelity Mortgage Investors

A Member of the Firm

767 Fifth Avenue New York, New York 10022 (212) 758-7800

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CAMELIA BUILDERS, INC. and FARNALE, INC., a Joint Venture

PLAINTIFF

vs.

CIVIL ACTION NO. J75-69(N)

FIDELITY MORTGAGE INVESTORS

DEFENDANT

NOTICE

SOUTHERN DISTRICT OF MISSISSIPPI

MAR 2 5 1975

TO: James Leon Young, Esquire 930 Deposit Guaranty Bank Building Jackson, Mississippi

ROBERT C. THOMAS, CLERK

You are hereby advised that the application for relief in the attached Complaint will be heard before Honorable Walter L. Nixon at 1:00 o'clock P.M. in the Federal Courthouse in Meridian, Mississippi, on March 26, 1975.

This the 25th day of March, 1975.

Thomas W. Crockett, Jr., Attorney for Plaintiff

Perry, Phillips, Crockett & Morrison P.O. Box 22628 Jackson, Mississippi 39205

#### CERTIFICATE

This is to certify that I have personally delivered to James Leon Young, Esquire, Attorney for Defendant Fidelity Mortgage Investors, and the Substitute Trustee in the Deed of Trust referred to in the Complaint filed herein, the above and foregoing Notice at 1032 o'clock A.M. on March 25, 1975, along with a copy of said, Complaint.

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POBERT C. THOMAS, CLERK

CAMELIA BUILDERS, INC. and FARNALE, INC., A Joint Venture

S S S S

CIVIL ACTION NUMBER 75-69 (N)

FIDELITY MORTGAGE INVESTORS

#### COMPLAINT

# Parties

- Camelia Builders, Inc. and Farnale, Inc., a Joint Venture, organized under the laws of the State of Mississippi and having its principal place of business in Jackson, Mississippi is composed of Camelia Builders, Inc., a Mississippi corporation having its principal place of business in Jackson, Mississippi and Farnale, Inc., a Texas Corporation, duly qualified to do business in the State of Mississippi and having its principal place of business in Houston, Texas.
- 2. Fidelity Mortgage Investors is a Massachusetts business trust not qualified to do business in the State of Mississippi having its principal place of business in Jacksonville, Florida.

#### Jurisdiction and Venue

- 3. Upon the provisions of Title 28 U.S.C. § 1332 and Title 28 U.S.C. § 1334.
- 4. Venue lies in the present district because this lawsuit pertains to real property located herein.

# Statement of the Case

5. This lawsuit involves the conflicting priorities of liens between the mechanic's and materialmen's lien of a general contractor and the deed of trust lien of an interim lender in connection with the construction of a condominium project as well as the right of the interim lender to foreclose its lien at a time when it is in default under the terms of its loan obligations.

#### Chronology

6. The major events which are the basis of the present action can be summarized as follows:

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- (a) On or about the 29th day of March, 1972, Camelia Builders, Inc. and Farnale, Inc., A Joint Venture herein called Joint Venture; as general contractors entered into a contract with Camellia Bay Corporation as Owner for the construction of an 80 unit condominium project in Jackson, Mississippi, said contract is attached hereto, marked Exhibit "A", and incorporated herein by reference for all purposes.
- (b) On or about the 29th day of March, 1972, Camellia Bay Corporation entered into a construction loan agreement with Fidelity Mortgage Investors, hereinafter called Fidelity, for the purpose of securing the financing of the the construction of the aforementioned project and the Joint Venture agreed to same on said date pursuant to the terms fo the agreement by General Contractor; said agreements being attached hereto, marked Exhibit "B" and incorporated herein by reference for all purposes.
- (c) In March, 1973 construction work had ceased on the project for failure of payment to the contractor as demonstrated by correspondence from Fidelity dated March 28, 1973, a copy of which is attached hereto marked Exhibit "C" and incorporated herein by reference for all purposes.
- (d) In May, 1973, Fidelity represents that it has \$627,165 available for construction costs as demonstrated by correspondence from Fidelity attached hereto, marked Exhibit "D" and incorporated herein by reference for all purposes
- (e) On May 21, 1974 Fidelity again acknowledges its failure to timely fund and again represents that it will fund its obligations as demonstrated by correspondence from Fidelity dated March 21, 1974, a copy of which is attached hereto, marked Exhibit "E"and incorporated herein by reference for all purposes.
- (f) In October, 1974, Joint Venture ceases work on the project for non payment.
- (g) January, 1975, Joint Venture files lien against the project and suit to enforce the lien and for monetary judgment in the Circuit Court of Rankin County, Mississippi as shown by Exhibit "F" attached hereto, and incorporated herein by reference for all purposes.
- (h) January, 1975, Fidelity apparently filed Chapter XI proceedings and seeks to abate Joint Venture's lawsuit as shown by Exhibit "G" attached hereto and incorporated herein by reference for all purposes.
- (i) March, 1975, Fidelity seeks to foreclose its lien on the project by power of sale.

#### Count 1

- 7. Joint Venture complains of the Defendant herein bringing this cause of action pursuant to Title 28 U.S.C. § 959.
- Joint Venture incorporates herein Paragraphs 1-6 of this Complaint.
- 9. Fidelity, apparently under the auspices of the Bankruptcy
  Court for the Southern District of New York seeks to foreclose through

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thereon that are the subject of the construction contract attached hereto as Exhibit "A" on March 28, 1975. 10. Joint Venture alleges on information and belief that Fidelity is in default in its obligations in advancing the funds that are the basis of its lien aforesaid. Additionally, the notice of sale was not posted for three weeks prior to the said sale, as required by the laws of the State of Mississippi. 11. Joint Venture is entitled and seeks declared judgment that Fidelity has no right to foreclose its lien aforesaid; to have vacated the authority, if any, of Fidelity to conduct a fore-

closure on the real property and improvements located thereon that are the subject of this lawsuit, or in the alternative, to require that such foreclosure be conducted by Chancery proceeding.

#### Count 2

- 12. Joint Venture complains of Fidelity herein bringing this cause of action pursuant to Title 28 U.S.C. § 2201.
- 13. Joint Venture incorporates herein Paragraphs 1-6 and 9-11.
- 14. Joint Venture alleges that its mechanic's and materialmen's lien is superior to and is entitled to priority over the lien, if any, of Fidelity. In this connection, the lien of the Joint Venture arises as the result of the Joint Venture having provided services, labor and materials in the amount of approximately \$75,964.33 for which it has not been paid, for the construction of improvements located on the property that is the basis of this lawsuit pursuant to the construction contract attached hereto as Exhibit "A".
- 15. Joint Venture is entitled to and seeks declaratory judgment that its lien claim in the approximate amount of \$75,964.33 is superior to and has priority over the lien claim of Fidelity. In the alternative, in the event Fidelity is parmitted to conduct its foreclosure tale, Fidelity should be required to tender into the remistry of this Court the sum of \$75,964.33 representing the amount of the claim of the Joint Venture pending final hearing herein.

16. Joint Venture complains of Fidelity herein bringing this cause of action pursuant to the common law of contracts and trusts. 17. Joint Venture incorporates herein paragraphs 1-6, 9-11 and 13. 18. Fidelity has heretofore segregated and set aside as trust funds for the benefit of the Joint Venture funds necessary for the completion of the construction project that are the basis of this lawsuit as demonstrated by correspondence from Fidelity attached hereto as Exhibit "D". Fidelity has breached its duty to Joint Venture herein in failing to pay over suchsegregated trust funds. 19. Joint Venture is entitled to and seeks to have this Court order Fidelity to turn over to Joint Venture the sum of \$75,964.33 from said segregated trust funds held by Fidelity as aforesaid for the benefit of Joint Venture. 20. All conditions and obligations of the Joint Venture precedent to the filing of this Complaint have been performed. WHEREFORE, Joint Venture respectfully prays that the Defendant, Fidelity Mortgage Investors be cited to appear herein and show cause if any it has, why: (1) Fidelity Mortgage Investors should be permitted to conduct a sale of the property and improvements that is the basis of this lawsuit by trustee sale on March 29, 1975. (2) The Order of the Bankruptcy Court of the Southern District of New York authorizing Fidelity to foreclose its lien on the property that is the basis of this lawsuit should not be vacated; (3) Fidelity Mortgage Investors should not be required to conduct the sale of the property and improvements that are the basis of this lawsuit pursuant to foreclosure by Chancery proceeding; (4) Fidelity Mortgage Investors should not be required to turn over to Camelia Builders, Inc. and Farnale, Inc., a Joint Venture the sum of \$75,964.33; and, that upon final hearing hereof, this Court determine that the mechanic's and materialmen's lien of the Joint Venture is superior and entitled to priority over the lien claim of Fidelity Mortgage Inventura: that Fidelity Mortgage Investors is in default of its the state of the second obligations in connection with the loan that is the basis of its lien and that it be permanently enjoined from foreclosing its lien on the property and improvements that are the basis of this lawsuit until such time as it shall remedy its default; that Fidelity Mortgage Investors be required to turn over to the Joint Venture the sum of \$75,964.33, for interest thereon, for costs of Court and for such further relief as the Court may deem proper.

Plaintiff demands trial by jury.

Respectfully submitted,

JEFFREY H. HUBBARD
Attorney for Plaintiff
2297 Two Shell Plaza
Houston, Texas 77002
(713) 225-0837

STATE OF TEXAS \$
COUNTY OF HARRIS \$

BEFORE ME, the undersigned authority, on this day personally appeared JEFFREY H. HUBBARD, who, being by me first duly sworn, on oath deposes and says:

"My name is Jeffrey H. Hubbard. I am attorney for Camelia Builders, Inc. and Farnale, Inc., a Joint Venture in the above styled and numbered cause, and as such am fully authorized to make this affidavit. I have read the foregoing Complaint and Motion for I have read the foregoing Complaint and Motion for Show Cause hearing to which this affidavit is attached and the allegations of fact contained therein are true and correct."

JEFFREY H. HUBBARD

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Jeffrey H. Hubbard on this the 23rd day of March, 1975.

NOTARY PUBLIC IN AND FOR HARRIS COUNTY, T E X A S

Respectfully submitted, THOMAS W. CROCKETT, JR.
Attorney for Camelia Builders,
Inc. and Farnale, Inc., a
Joint Venture Perry, Phillips, Crockett & Morrison P. O. Box 22628 Jackson, Mississippi 39205 113

FIDELITY MORTGAGE INVESTORS

March 28, 1973

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas H. Quinn
Camellia Bay Corporation
& First General Resources Corporation
505 Park Avenue
New York, New York 10022

Re: Camellia Bay Condominium Project

Dear Mr. Quinn:

This letter will confirm recent telephone conversations between representatives of Fidelity Mortgage Investors, Camellia Bay Corporation, Camellia Builders, Inc. and/or Farnale, Inc. and Travelers Indemnity Company. Camellia Bay Corporation is the owner of the Camellia Bay Condominium project, Camellia Builders, Inc. and/or Farnale, Inc. are the general contractors, Fidelity Mortgage Investors is the interim construction lender and Travelers Indemnity Company, as surety, and Camellia Builders and/or Farnale, Inc., as principals, have issued payment and performance bonds to Fidelity Mortgage Investors and Camellia Bay Corporation, with reference to the construction contract.

As you are aware, construction work on the project has ceased. The reason for cessation of such construction work can be primarily attributed to a good faith dispute as to the amount of work that has actually been completed on the project. It was the position of Fidelity Mortgage Investors and Camellia Bay Corporation that there was not sufficient percentage completion of the project to justify the draw request in the amount of \$106,437.00 submitted by the general contractor. It was the position of the general contractor that the percentage completion was amply sufficient to justify the draw request. It is our

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feeling that all parties are acting in good faith.

Subject to your approval and written advice, Fidelity Mortgage Investors will fund the \$106,437.00 requested by the general contractor in the most recent draw request. Subject to your approval and written advice Fidelity Mortgage Investors will fund future draw requests, at its discretion, even though it still may be of the opinion that the percentage of completion may not balance with the amount requested and the cumulative amount drawn to the date of the draw request. By copy of this letter we are advising Farnale, Inc. and Travelers Indemnity Company of our intentions and request that they advise us of any objections they may have to our proceeding in this manner. We recognize that the general contractor by raising no objection to this procedure, does not now admit, or admit in the future, that the percentage of completion is not equal to the cumulative amount drawn and requested.

By telephone conversation with representatives of the general contractor I have been advised that they are willing to carry forward with the construction if the following conditions are met:

- 1. Contract draws are funded as submitted.
- 2. Camellia Bay Corporation will retain an architect familiar with local single-family construction.
- 3. Camellia Bay Corporation will give the general contractor assurances concerning the source of payment of requested change orders.

It is my understanding that it is your intention to meet with the general contractor in order to see that these conditions are resolved. It is our suggestion that this meeting take place immediately so that construction may be commenced as soon as possible. We feel that this letter indicating our intentions will facilitate resolution of the first condition and it would appear that the other two can be resolved very easily.

If we have received no objections from the general contractor or from Travelers Indemnity Company with reference to our funding draw

Page three

requests as outlined above, we will wire \$106,437.00 to the title company for payment to the general contractor.

Very truly yours,

George C. Black, Jr. Black

/j

CC: Mr. Rue Goodale Farnale, Inc.
Houston, Texas

Travelers Indemnity Company Houston, Texas

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p.
-371

May 1, 1973

Mr. Thomas H. Quinn
Camellia Bay Corporation and
First General Resources Corporation
505 Park Avenue
New York, New York 10022

Re: Camellia Bay Corp. FMI Loan No. 71-371

. Dear Mr. Quinn:

This letter will confirm to you that the amount of funds set aside in the subject loan for construction purposes was \$1,475,000. Of this amount, \$847,835 has been disbursed to date and the undisbursed balance of funds set aside for construction purposes is \$627,165. This undisbursed balance which is allocated for construction purposes and not subject to other charges, is available for completion of construction on the subject project.

Very truly yours,

Charles R. MacDowell

CRM: bmh

CC: Mr. R. L. Goodale
Farnale, Inc. and Camellia Builders, Inc.

The Travelers Indemnity Company Attn: Mr. Rhodes

E 29'

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SUBSIDIARY TO GEORGE WASHINGTON CORPORATION

CONSULTANTS TO

# FIDELITY MORTGAGE INVESTORS

NEWELL L. WEAS

March 21, 1974

Mr. Tom Quinn
First General Resources
505 Park Avenue
New York, New York 10022

Mr. Rue Goodale President Farnale, Inc. Post Office Box 55347 Houston, Texas 77055

Mr. O. B. Taylor Chairman Mississippi Valley Title Insurance Company P. O. Box 2428 Jackson, Mississippi 39205

Mr. Dominic Montessi P.O. Box 12275 Jackson, Mississippi 39211

Mr. William Morrison 4734 North State Street Jackson, Mississippi 39206

#### Gentlemen:

In the interest of all parties and to expedite the completion of the Camellia Bay project, I would like to set forth the following procedures as approved by FMA's Asset Review Committee, for disbursement of the remaining funds in the construction contract. While this procedure differs somewhat from recent proposals, the end result will be the same with several resultant benefits. This procedure applies only to the contracted amount and does not apply to "additive"

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1653. AS AMENDED AND RESTATED, AND ALL PERSONS DEGLING WITH FIDELITY MOSTBAGE WITHOUTH CONTROLLED FOR THE TRUSTERS, AS AMENDED AND RESTATED, AND ALL PERSONS DESIGNATION OF THE STRONG THE TRUSTERS. APPRICADS, AMENTE OR SMARTHOLDING ASSUME ANY THE SEMPONDERS FOR THE CANADADE OF THE STRONG THE ST

645 RIVERSIDE AVENUE / P. O. BOX 4214 / JACKSONVILLE, FLORIDA 32203 / (904) 358-6177

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change orders". An outline follows:

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- Simultaneous "draw requests" are to be submitted to FMA and Mississippi Valley Title Company (Attn: Mr. O. B. Taylor) by Farnale representatives.
- The requests should be signed by the contractor's representative.
- 3. The request for funds, submitted to Mississippi Title, should be signed by the architect, Mr. Morrison, and the owners on site authorized representative, Mr. Montessi, to validate percentage of work in place and to certify quality in compliance with existing specifications.
- 4. Upon the verification by Mississippi Valley Title
  Company that the draw request is properly executed
  and validated and, that it has satisfactory title
  endorsement showing no intervening liens (except
  the approximate \$78,000 paint and drywall lien,
  which is being indemnified by Travelers Indemnity
  Company), Mr. O. B. Taylor will notify Fidelity
  Mortgage Advisors via telephone of such compliance
  and simultaneously forward to Fidelity Mortgage
  Advisors this written verification.
  - 5. When Fidelity Mortgage Advisors has had a minimum of forty eight (48) hours to review the original advance request and upon notification by Mississippi Valley Title Company that all is correctly executed, Fidelity Mortgage Investors will wire the approved funds to Mississippi Valley Title Company for disbursement.

I feel the above procedure gives equitable consideration to all parties and offers the best solution under the current circumstances.

It should be noted that this procedure will require minimally, two days plus mail delivery time to work as presently set up.

This procedure will minimize, as much as is possible, funding delays to the contractor and it will assure the borrower/developer of proper certification and validation of the product.

otherwise modify any previous contractual agreements by and between any of the parties.

By following closely the outlined format the project will be completed in the least possible time which will benefit all concerned.

Sincerely.

Newell L. Weas

NLW: vir

cc: Nick Goad
Farnale, Inc.

Chuck MacDowell
E. Thomas Morris, Jr.,

THE NAME FIDELITY WORTGAGE INVESTORS IS THE DESIGNATION OF THE TRUSTESS FOR THE TIME BEING UNDER A DECLARATION OF TRUST PROPERT FOR 1896. AS AMENICA AND RESTAYED, AND ALL PERSONS CEASING WITH FIDELITY MONTGAGE INVESTORS OFFICERS, AGENTS OR SMARRHOLDESS ASSUME AN INVESTOR OF THE TRUSTESS. OFFICERS, AGENTS OR SMARRHOLDESS ASSUME AN INVESTOR OF THE TRUSTESS. OFFICERS, AGENTS OR SMARRHOLDESS ASSUME AN INVESTOR OF THE TRUSTESS.

CAMELIA BUILDERS, INC. AND FARNALE, INC., A JOINT VENTURE,

PLAINTIFFS

NO. 8343

vs.

DEAMELLIA BAY CORPORATION, FIRST GENERAL RESOURCES COMPANY, AND FIDELITY MORTGAGE INVESTORS

DEFENDANTS

# PETITION TO ENFORCE LIEN AND FOR MONETARY JUDGMENT

THE CIRCUIT COURT OF BANKIN-COUNTY A MIDDLE OF THE COUNTY A MIDDLE O

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Comes now Camelia Builders, Inc., a Mississippi corporation, and Farnale, Inc., a Texas corporation duly qualified to do business in the State of Mississippi, a joint venture, Plaintiffs, and files this their suit against Defendants, Camellia Bay Corporation, First General Resources Company, and Fidelity Mortgage Investors, and for their cause of action would respectfully show unto the Court the following:

is a Mississippi corporation domiciled in Jackson, Hinds County, Mississippi, and upon whom the process of this Court may be had by serving its registered agent for process, Tilen C.

Thompson, 411 Bankers Trust Plaza Building, Jackson, Hinds County, Mississippi. Defendant First General Resources

County, Mississippi. Defendant First General Resources

Company (First General) is a New York corporation not qualified to do business in the State of Mississippi, whose business address is 505 Park Avenue, New York, New York, 10022, but upon whom the process of this Court may be had by serving the Secretary of State of the State of Mississippi under the provisions of Section 13-3-57 of the Miss. Code of 1972, Annotated.

Defendant Fidelity Mortgage Investors (Fidelity Mortgage) is a Massachusette Business Trust, under Declaration of Trust dated May 29, 1969, as Amended and Restated, is not qualified

Exhibit "F"

address is Post Office Box 4214, Vacksonville, Florida,
32203, but upon whom the process of this Court may be had by
serving the Secretary of State of the State of Mississippi
under the provisions of Section 13-3-57 of the Miss. Code of
1972, Annotated.

- 2. The following are all persons, other than the parties hereto, having an interest in this controversy or claiming liens on the same project and should be made parties to this suit: J. Woodrow Sharpe and Eagle Enterprises, Inc., who may be served with process of this Court at their principal place of business at 3056 Terry Road, Jackson, Mississippi; William Robinson, d/b/a Robinson Roofing and Siding Co., whose address is unknown; Brent's Nursery, Inc., who may be served with process of this Court by serving its registered agent for process, Pat H. Scanlon, Suite 930, Deposit Guaranty Bank Building, Jackson, Mississippi; and Gulf States, Inc., who may be served with process of this Court by serving its registered agent for process, Leland R. Speed, Suite 1047, Deposit Guaranty Bank Building, Jackson, Mississippi.
- 3. On or about the 29th day of March, 1972, Camellia Bay, Fidelity Mortgage Investors and Plaintiffs entered a Construction Loan Agreement relating to a condominium project in Rankin County, Mississippi, to be known as "Camelia Bay", a copy of which is attached as Exhibit "A" and made a part hereof by reference.
- 4. On the same date, Camellia Bay and Plaintiffs entered a contract for the construction of said condominium project, being "AIA Document AlO1, Standard Form of Agreement Between Owner and Contractor". Said contract incorporated by reference "AIA Document A201, General Conditions of the Contract for Construction", copies of which are attached hereto as Exhibit "D" and made a part hereof by reference.

Said contract has been amended and clarified by thirteen change orders as provided therein and certain letters. Said change orders are attached hereto as Exhibits "B-1" through "B-13" and made a part hereof by reference. Defendant First General, with the consent of all concerned, stepped into the position of Camellia Bay and assumed control of and responsibility for said condominium project. The said contract for construction of said project, being Exhibit "B" with attached change orders, was amended by the following letters:

Letter from Plaintiff to William D. Morrison, Architect, dated June 18, 1973, a copy of which is attached hereto as Exhibit "C" and made a part hereof by reference.

Letter from William D. Morrison, Jr., Architect, to Thomas H. Quinn, Camellia Bay Corporation, dated June 21, 1973, a copy of which is attached hereto as Exhibit "D" and made a part hereof by reference.

Letter from Thomas H. Quinn, Chairman of the Trustees of First General Resources Company, to Plaintiffs, dated June 27, 1973, a copy of which is attached hereto as Exhibit "E" and made a part hereof by reference.

The duties and obligations of Defendant First Mortgage were more clearly spelled out and explained by letter from Newcll L. Weas on behalf of First Mortgage Advisers, Inc., the agent of Fidelity Mortgage Investors, a copy of which is attached as Exhibit "F" and made a part hereof by reference.

4. A description of the property upon which the construction was performed and upon which the lien is sought to be enforced is attached as Exhibit "G" hereto and made a part hereof by reference. with a conficulty of the contract of the contr 5. Plaintiffs proceeded to perform their duties to Defendants under said contracts as amended. In August, 1974, Plaintiffs submitted a properly executed draw request which was approved by both the architect, William D. Morrison, Jr., and Dominic Montessi, the representative of the owner. Said draw request was not paid for thirty days, and in fact has not yet been paid. Pursuant to said contract attached as Exhibit "B", Plaintiffs gave Defendant First General notice of intent to stop work and did stop work on about October 3, 1974. After having stopped work, Plaintiffs gave Defendants timely notice of termination of contract and said contract is now terminated. Plaintiffs are entitled to recover under said contract the sum of \$75,964.33 due for work executed to date. WHEREFORE, Plaintiff's demand as follows: A. That judgment be entered against the builders, Camellia Bay Corporation and First General Resources Company, generally in the amount of \$75,964.33, with costs; B. That Plaintiffs be adjudged to have a lien on said property securing said sum; C. That said judgment be executed and the property sold as provided by Section 85-7-151, Miss. Code of 1972, Annotated, and other appropriate statutory provisions; and D. That the lien of Plaintiffs be adjudged to be

superior to that of Defendant Fidelity Mortgage Investors.

#### SECOND COUNT

The Plaintiffs readopt all of the allegations of the First Count.

For reasons set forth in said First Count, Plaintiffs demand judgment against the Defendants, Camellia Bay Corporation, First General Resources Company, and Fidelity Mortgage Investors, jointly and severally, in the sum of \$75,964.33.

Respectfully submitted,

CAMELIA BUILDERS, INC. AND

Porry, Phillips, Crockett & Morrison
717. Deposit Guaranty Bank Building
Jackson, Mississippi

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ALLOW AND STREET OF COURT OF RAUMIN COUNTY, TEDISSIPPI 

CAMPLIA BUILDERS, INC., And PLAINTIFFS PLAINTIFFS

NO.

CAMELLIA BAY CORPORATION, FIRST GENERAL RESOURCES COMPANY, And FIDELITY MORTGAGE INVESTORS

DEFENDANTS

#### PLEA IN ABATEMENT

COMES NOW Fidelity Mortgage Investors, one of the Defendants in the above styled cause, and files this plea in abatement, respectfully showing:

- 1. On January 30, 1975, Defendant Fidelity Mortgage Investors filed a petition under Chapter XI of the Federal Bankruptcy Act (11 U.S.C. §301, et seq.) in the United States District Court for the Southern District of New York.
- 2. Under Rule 11-44 of the Rules of Bankruptcy Procedure, the filing of such Chapter XI petition automatically stays the commencement or continuation of any court or other proceeding against the Debtor, Fidelity Mortgage Investors, or of any act, or commencement or continuation of any court proceeding to enforce any lien against the property of Fidelity Mortgage Investors.
- 3. This action should be abated until the conclusion of the Chapter XI arrangement petition of the Defendant, Fidelity Mortgage Investors.
- 4. Upon conclusion of such Chapter XI proceeding, if the disputes between the Plaintiffs and the Defendants herein have not been resolved, Defendant Fidelity Mortgage Investors reserves the right to file such additional pleadings, demurrers, pleadings, and answers as it deems appropriate in the premises at that timo.

Attorney for Fidelity Mortgage

Investors

Pat H. Scanlon Young, Young & Scanlon 930 Deposit Cuaranty Bank Bldg. Jackson, Hississippi 39201

Exhibit "6"

Attorney for Defendant Pidelity /26 A Company of the control of the cont

# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DISTRICT

CAMELIA BUILDERS, INC. AND FARNALE, INC., A JOINT VENTURE

PLAINTIFFS

V.

APPEARANCES:

C.A. NO. J75-69(N)

FIDELITY MORTGAGE INVESTORS

DEFENDANT

( FOR THE PLAINTIFFS:

( Hon. Rubel L. Phillips ( Attorney at Law ( P. O. Box 22628 ( Jackson, Miss. 39301

( Hon. Jeffrey H. Hubbard ( Attorney at Law ( 2297 Two Shell Plaza

( Houston, Texas 77002

FOR THE DEFENDANT:

( Hon. James Leon Young ( Attorney at Law

( 930 Deposit Guaranty Natl. Bank Bldg. ( Jackson, Miss.

BE IT REMEMBERED that on the 26th day of March,1975, this cause came on for hearing before the Honorable Walter L. Nixon, Jr., Judge of said Court, and the following proceedings were had and done in the U. S. District Court Room, Federal Building, Meridian, Mississippi, to-wit:

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BY THE COURT:

All right, you may proceed.

BY MR. HUBBARD:

May it please the Court, I was just going to call Mr. Rue Goodale.

RUE GOODALE, called as a witness by the plaintiff, being duly sworn, testified as follows:

BY MR. YOUNG:

Your Honor, the defendant would like to object to the plaintiffs being permitted to offer any live testimony in this proceeding at this time on the grounds that the notice which was served upon the defendant yesterday, at 10:32 A. M., is wholly inadequate to give the defendant an opportunity to prepare any responsive testimony.

BY THE COURT:

What do you say in answer to that, gentlemen?

BY MR. HUBBARD:

Your Honor, we are simply trying to demonstrate to the Court the basis for the Court's issuance of show cause order as requested here.

BY THE COURT:

Why is this an emergency matter? You may state for the record, if you care to.

BY MR. HUBBARD:

Thank you, Your Honor. The defendant in this cause,

Fidelity Mortgage Investors, has apparently filed a Chapter
11 proceeding in the Bankruptcy Court of New York and they
seek now to foreclose on certain real property located in
Jackson, Mississippi, on March 28, 1975. This matter was
only brought to the attention of the plaintiff herein last
Friday. The plaintiff has a petition to enforce lien on file
in connection with that real property, and believes the lender
to be in default with its loan obligations in connection with
the deed of trust upon which it seeks to foreclose and believes that defendant has not complied with the laws of the
State of Mississippi for foreclosure, and that the-BY THE COURT:

All right. Under the circumstances and due to the exigency of the situation, to deny the plaintiff the right to proceed at this time would be denying him his day in court to a moot question, and so the witness is subject to cross examination, of course. I don't know whether the defendant herein has attempted to procure any witnesses, or actually will dispute what this witness will testify. I'm unfamiliar with the proceedings, but he is subject, of course, to cross examination. I don't know who defendant has in Court now in consultation with defendant's attorney. Is this a representative of the defendant?

BY MR. YOUNG:

Your Honor, this is a law student that works as a

A The total sum due subcontractors on the project will approximate \$85,000.00.

# BY MR. HUBBARD:

Q All right. Now will you tell the Court please whether or not your contracts with your subcontractors on this project require that they will not be paid until the general contractor has been paid?

A We have a standard provision in our contract that says we will pay the subcontractor within five days after receipt of the funds from the owner.

# BY MR. HUBBARD:

Pass the witness.

# CROSS EXAMINATION

### BY MR. YOUNG:

Q Mr. Goodale, did you know that Fidelity Mortgage Investors was in bankruptcy?

A I read an article in The Wall Street Journal, dated January 31, 1975, which indicated that that was a fact. I believe it was some type Chapter 11 proceedings. I'm not exactly sure of the date, but that's within a day or so of the actual date.

Q The marshal is handing you a photocopy of what I believe is the article you referred to. Is that the one you read?

A My recollection of the article that I saw consisted

of one column only and was a very short notice. I did not read this particular article; no, sir.

Q What is the date on that particular article that I hand you?

A It is dated Friday, January 31, 1975.

Q And that's the same date that you said you believed and remembered reading the article?

A I--I said I was not sure of the date, one day or the other, but I have the article in my office that I did read, and it is not this long.

# BY MR. YOUNG:

We would like to offer that copy of that article of The Wall Street Journal into evidence.

(Article was shown opposing counsel.)

# BY MR. HUBBARD:

If it please the Court, we object for the copy, and for the relevancy.

#### BY THE COURT:

For what purpose is it offered if the witness says he did not see this particular article?

# BY MR. YOUNG:

Your Honor, he says that he saw one on or about that same date, and we're offering it for the purpose of showing that the plaintiffs in this lawsuit are well aware of the bankrupt status of the defendant.

# BY THE COURT:

Is there any contest of that --

# BY MR. HUBBARD:

No. sir. That's true.

# BY THE COURT:

Do you still offer it?

#### BY MR. YOUNG:

Yes, sir.

# BY THE COURT:

Let it be admitted for what it's worth, Exhibit D-1, with that concession and stipulation.

# BY MR. YOUNG:

Q Mr. Goodale, did you discuss the bankrupt status of the defendant in this proceeding with the attorneys for your company?

A No, sir. I don't believe I've ever sat down and discussed it other than to say possibly that Fidelity has filed a Chapter 11. It hasn't gotten outside that--

- Q They knew they had filed a Chapter 11: didn't they?
- A I--I'm sure they did. Yes, sir.
- Now there is exhibited to the petition or the complaint that has been filed in this case and you have introduced into evidence through your attorney here today, a number
  of letters that passed back and forth by and between the
  various parties in connection with this project; is that true?

23 Is that what it says? Yes, sir. We did do that. All right, sir. And since the plea in abatement for bankruptcy has been filed in that case by FMI, no further action has been taken in that case; has it? Mr. Young, I can't answer that question. That's a legal question and I'm not legally trained. Well, you're the chief executive officer of this company; aren't you? I'm the president of Farnale, Incorporated, but I do not know that we have or have not taken additional action on this particular case. As far as you know, it's still laying there just like it was the day that plea in abatement was filed Now I'm not -- and again, I don't have the plea in abatement. I'm talking about this instrument right here and as far as I know, it is being pursued but it has not come to trial. You were aware the plea in abatement had been filed based upon the bankruptcy of FMI; were you not? A Yes, sir. I got a copy of Mr. Scanlon's plea, probably the first of this week. Now when did FMI first file a lien notice on the public records of Rankin County against the property that is the subject of this deed of trust? I have never seen the instrument so I cannot answer 133

is handling that part. I know practically nothing about it except who the parties are. I asked him a simple question, Your Honor, which is simply whether or not he knew whether or not the last money was disbursed well prior to the time they filed their lien notice.

# BY THE COURT:

Do you know that?

A I don't know the date, Your Honor, but I brought the records myself to the Court House in Jackson this morning, so I know they are there.

#### BY THE COURT:

Pursuant to a subpoena?

A I believe he has--he has a copy of the subpoena; yes, sir.

# BY MR. YOUNG:

Your Honor, my point is that on direct he testified as to what he recalled. When I asked him about what he recalled, he says, "Well, I'm not sure. It's in the records."

BY THE COURT:

I'll deny that motion.

# BY MR. YOUNG:

I have no further questions.

### REDIRECT EXAMINATION

# BY MR. HUBBARD:

Q Mr. Goodale, I believe you have testified that you

first knew when the Fidelity was in bankruptcy--was in January, 1975; is that correct?

A Yes, sir.

Q When did you first learn that Fidelity was attempting to foreclose on its deed of trust in Jackson?

A I can't give a direct statement as to the exact date.

I have just heard it in the last--I would say last 10 days.

BY MR. HUBBARD:

In the interest of time, Your Honor, I could have the witness read, but I will call the Court's attention to the paragraph 7 on page 19 of plaintiff's Exhibit 2, which is the contractor's agreement to the loan, and to the correspondence marked plaintiff's Exhibit 3 and plaintiff's Exhibit 5, from the Fidelity for the purpose of showing, in our opinion, that we are not operating under the provisions of that paragraph 7, and that the Fidelity has agreed to set aside the sums of money heretofore mentioned in plaintiff's Exhibit No. 4.

I have no further questions, Your Honor.

BY MR. YOUNG:

Nothing further, Your Honor.

(WITNESS EXCUSED)

BY MR. HUBBARD:

Plaintiff rests.

BY MR. YOUNG:

Your Honor, I would like to offer two affidavits,

A Again, that letter from Fidelity indicated that upon presentation of a properly executed estimate for payment, after Mississippi Valley Title Company forwarded it to Jacksonville, that they would have 48 hours in which to pay it. I don't think--and our records, while they are not in this Court Room right now--I think they will very clearly show that they never did pay according to the terms of that letter.

BY MR. YOUNG:

I object to that, Your Honor. He said he doesn't know; if he doesn't know, he doesn't know. He could have brought copies of records if he deemed them pertinent, and in addition to that, he is attempting to say what the contract says, and what the letters say, and they speak for themselves.

BY THE COURT:

I will disregard the last part of the answer to what he thinks the records show or don't show. If he knows of his own knowledge, he may so testify to the best of his recollection, if he has a recollection rather than being merely a guess.

# BY MR. HUBBARD:

Q Mr. Goodale, do you know how often draw requests were submitted in connection with this project by the general contractor?

A At the start of the project it was to be on a monthly basis. After the first close down I think it varied in time.

for one reason or another.

Q Do you recall approximately how much time elapsed after July--beginning after July, 1973--from the time the general contractor submitted a request for payment until funds were received?

A Well, I can be very specific on draw request No. 21, and that is it has never been received.

Q Do you recall the approximate date that draw request No. 21 was sent in?

A I believe the date of it is August 24, 1974.

Q Were any of the draw requests of the contractor arising subsequent to April, 1974, or any part thereof, paid to the contractor?

A You'll have to restate the question.

Q Excuse me. After April, 1974, did the contractor send in requests for payments?

A Yes, sir.

Q Were any of those requests, or any portion of those requests paid?

A Yes, sir. Portions of them were.

BY MR. HUBBARD:

Pass the witness.

BY THE COURT:

Cross examination?

BY MR. YOUNG:

No further questions.

BY MR. HUBBARD:

Plaintiff rests.

BY THE COURT:

Both sides rest.

(WITNESS EXCUSED)

BY THE COURT:

I will give you five minutes to the side.

(Both sides waived a record being made of the argument.)

(After a short recess was had, the Court made a ruling. The ruling of the Court was transcribed and sent to Judge Nixon for revision, and the following constitutes the edited transcript of the Court's order and opinion.)

This will constitute the order and opinion of this

Court on the claim filed by the plaintiff herein. The Court
reserves the right to edit, revise and correct this opinion,
if request is made therefor. This Court was asked to hear
this matter on Monday of this week, day before yesterday,
and I had plans to be out of this district, beginning today.

I told the parties I would hear this matter which is an
emergency matter inasmuch as the foreclosure that is to take
place is scheduled for day after tomorrow. Consequently, this
Court has not had the opportunity to adequately research the
law governing the questions presented here today, particularly
that of jurisdiction of this Court but is of the opinion that

if there is any semblance of merit to the complaint filed .
herein the following relief should be, and will be granted.

I will not enjoin the substituted trustee from foreclosing the lien on the property in question but will require him to deposit in the registry of this Court \$75,964.33 of the proceeds of the foreclosure sale, or if the sale brings a lesser amount, then that lesser amount. The Clerk of this Court shall deposit the above proceeds in an approved interest paying depository, subject to the further order of this Court or any other court of competent jurisdiction, and will permit the trustee and all others to file claims therefor. The foregoing action is necessary to protect the rights of all parties involved while at the same time not prejudice the rights of any party. Certainly, the Bankruptcy Court of the Southern District of New York has the exclusive right to require the trustee to liquidate all of the property of the bankrupt and to assume jurisdiction thereof, but I think we have a question as to whether the above proceeds are the property of the bankrupt, that is, which lien preempts. This must be decided as a prerequisite to determining whether this \$75,964.33 is actually the property of the bankrupt. Now I am not at all sure at this time whether that determination should be made by this Court or by the Bankruptcy Court in the Southern District of New York, but will reserve ruling on that question.

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coxers of offices and counties.

en this deserence to loud poverament is under increasing stack. In a lea dra nette cases, remaily before the Pennsylvania Su preme Court sound laws designed to frustree "natural growth" were ruled unconsti-The housing industry found ailles misad. among civil disertarians who arrued that otherwise claw growth policies deny hous-ing to the less afficient and abridge the constrange all right to equal protection, due pro-reas and freed in of travel.
Similarly, a Colorado' triel court last summer outlawed an attempt by the city of

Boulact to block building in a suburb by dening the developer city water and sewer hookups. The court said the city was, in efagain t potential customers. Boulder is ap-pealing the decision to the state supreme

Conflicting Precedents

The basics have been temporarily muted the national housing slump that has showed growth to a crawl. But observers warry that when the suburban housing boom restricts, the law will be a nightmare of conthrong procedents. "The issue of growthmedian presents. The issue of growth-median ordinances is still very much unset-tled," says Randell Scott, research counsel for the Urban Land Institute, a Washington "We're not sure where the soudy group.

ts are going.

And this confusion, the Petaluma case his embige las the one to watch. Petaluma's drustic action to slow its growth prompted developers in 1973 to bring suit in followed court, charging the city with abridgmint to travel," or migrate be the states, a right traceable to the Marca Carta The San Francisco federal ourt, in a storming decision, sided with develogers and outlawed the Petaluma Plan. Legal observers saw it as the first major attempt by a federal court to deny a city the power to stem growth

The decision, which is being appealed be-fore the Ninth Circuit Court and will likely be submitted to the U.S. Supreme Court, was haded by developers as a key federal precedent But their euphoria was shorthved Last April, just as Judge Lloyd Burke was releasing his Petaluma opinion, the 8u-preme Court issued a decision approving the zoning actions of the tiny village (pop. or Beile Terre on New York's Long Island.

Banning Compunes

Worned that its serenity would be dis-turbed by communes of young people, Belle Terrs had adopted an ordinance limiting residential lots to single-family homes and banning occupancy of any home by more than two unrelated persons. Three college students who shared a house sued the village, contending that the ordinance violated their constitutional rights to free associa tion, travel, privacy and equal protection of the laws. The American Civil Liberties I'mon argued the students' case.

When the suit reached the high court.

Justice Douglas, a civil libertarian, wrote the majority opinion upholding the village He quickly dismissed the charge that the ordinance interfered with the students' rights, including travel. And, in the court's first major comment on zoning since the 1926 Euclid case, Mr. Douglas said Belle Terre has the power "to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make this area sanctuary for people."

Belle Terre's ordinance didn't attempt to halt or slow growth, But Charles Meyers, a Stanford University law professor and landuse expert, notes that the case did raise the

Please Turn to Page 17, Column 1

infinited by a \$1.3 miluon nitosear power-plant contract. I Hill's F.W. Dodge unit said

( tery on Page 14)

American Telephone's Western Electric unit disclosed layoffs of about 2,500 workers since Jan. 1. Other companies also announced cutbacks.

(Story on Page 5)

The stock market pulled back on near-record New York Stock Ex-change volume of 29,740,000 shares. York Stock Ex-The Dow Jones industrial average fell 9.54 points to 696.42, and unalysts cited a normal technical correction and expected profit taking.

(Story on Page 23)

Five utilities in Ohio and Pennsylvania delayed the start-up dates of five nuclear and coal-fired power plants.

(Story on Page 9) .

Monetary experts of the non-Communist world are starting to work on details of new international lending operations to help oil-importing nations pay swollen petroleum bills.

(Story on Page 8) . .

The U.S. dollar ran into a renewed assault on international markets amid announcements documenting economic problems in other countries

(Stary on Page 13). . . .

A Saudi Arabian bid to acquire one-third of First National Bank of San Jose, Calif., was abandoned in response to intense community pres-(Story on Page 14)

Fidelity Mortgage, a sizable real estate investment trust, filed for protection under Chapter 11 of the Bankruptcy Act.

Security National Bank, acquired recently by Chemical Bank, was charged in a suit with fraud and deceit in reporting its financial condition.

(Story on Page 3)

Markets-

Stocks: Volume 29,740,000 shares. Dow Jones industrials 696 42, off 9 54; transportation 157.65, off 3.40; utilities 79.56, off 0.83

Bonds: Dow Jones 40 bonds 68 01, up 0.19 Commodities: Dow Jones futures index 323 22, up 0.30; eyot index 347.77, off 1.89

#### TODAY'S INDEX

Bond Markets Commodities Corretions Covidend News Earnyigs Digest Editorials	15 16 8 20 10 6	Funoncing Business Foreign Exchange Money Rates Securities Markets Tux-Exempts Whas News	15 20 15 17 72 15 10

Sandors were the and and greas would be possible if the failure to approve more maney for Sale in resided in a Communist takenover. See Edward King nedy accessed the administration of "Breass and scare tunces in his bid for a supplemental appropriation.

Most of a Mekny into comey catrying food, fuel and humanides received the Combodian capital of Francia Pech. Two fuel tunkers were sunk We includy by rebels who control the river's banks.

U.S. and Soviet desegates with resume Strategic Arms Limitation Talks in Geneva today to try to fill in details of the Vladivos tok agreement in principle. It limits each side to 2,400 missiles and long range bomb. ers, with up to 1,320 missiles carrying multi-ple warneads. But negotiators must decide, among other things, waether the new Soylet Eachtire" bombet is long range

Marchers to five Lebauese cities manded that the government rebuild the southern town of Kfar Shuba, which daily Israeli artiflery shellings have nearly de stroyed. Israel claims Palestinian terrorists are based there. The United Nations reports edly arranged a five day helt in the shelling so Lebanese government officials can in spect the town

Poor discipline in Israel's army was cited by a commission that investigated hat tlefield failures in the October 1973 war Most of its final report was disclosed only to

the government.

Soviet Foreign Minister Gromyka added visits to Syria and Iraq to his itinecary dur-ing a trip to Egypt next week. Arms sales, are expected to be a key topic of discussions in all three countries.

A suit charging discrimination against women and Mexican American workers was filed against the Western Conference of Teamsters' trust fund plan. The plain; ifis, seven retired workers, said women and Mexican Americans were denied the retire ment benefits given others, in violation of the Taft Hartley Act.

soon lead to higher properly taxes, wiping out the benefit to taxpayers and to the econoorny of proposed federal income-tax cuts a group of mayors told a Senate subcoramit They said state and local governments need emergency federal aid of at least to billion to avert tax boosts.

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. . A New York State budget for fiscal 1978 of \$10.69-billion, up nearly \$1 billion from the current year's, was proposed by Gov. Hugh Carey The budget includes a 10-centagallon increase in gasoline taxes, a provision expected to be opposed by many state legislators.

A family poisoned by mercury after cat-ing a hog that was fed fungicide-treated seed com lost a \$3.9 million damage suit against the government. A federal judge in Albuquerque, N.M., said the government wasn't hable because it required that the grain carry a warning label, which the famlly disregarded. . .

A British government commission advised Parliament against ending the bolicy of detaining suspected Northern Ireland tesrorists without trial one the spirital

A Dominicar DCs charter plane crushed after take off from Santo Domingo's airport and caught fire. The pilot was killed, but the 28 passengers, including 27 Canadians, were rescued.

Received Franciscon appellands

Karen Smith

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of appendix Dy her